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3
4 ALTERNATIVE DISPUTE RESOLUTION
5 FOR CONSUMER TRANSACTIONS
6 IN THE
7 BORDERLESS ONLINE MARKETPLACE
8
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11 MODERATORS:

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13 HUGH STEVENSON, FEDERAL TRADE COMMISSION
14 BARBARA WELLBERY, DEPARTMENT OF COMMERCE
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P R O C E E D I N G S

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MS. WELLBERY: Good morning. My name is Barbara Wellbery, and I am with the International Trade Administration in the Department of Commerce, and I along with Hugh Stevenson of the Federal Trade Commission will be moderating the workshop today.

I'd like to welcome you all to this workshop on alternative dispute resolution for online business-to-consumer transactions. I think this is a very exciting time on this issue since we're at the very beginning of the discussion. This is the first time certainly at the federal level that we've looked at ADR in the context of electronic commerce.

Our purpose today in holding this workshop is to bring together as many stakeholders as possible to begin the dialogue on this important issue that we hope will contribute to building consumer confidence on the internet. So, I'm particularly pleased to see so many of you here today from business, consumer organizations, from the academic community, and colleagues from both governments abroad and colleagues from our own governments.

This is an issue which right now -- in which there seems to be a tremendous amount of interest and

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1 also a lot of people are saying that this has -- ADR
2 has enormous potential to solve many of the more
3 difficult issues that arise in B-to-C e-commerce, but
4 as we all know, the devils are in the details, and
5 today and tomorrow, we will be spending a lot of time
6 with the devil trying to understand and sort through
7 the details and their implications for ADR in the
8 e-commerce environment.

9 I think we have a tremendous opportunity in the
10 next two days to further the dialogue on these issues
11 and to promote the growth of ADR for online
12 transactions. I look forward very much to hearing what
13 the panelists and the audience has to say on these
14 issues.

15 Now I would like to introduce the Department of
16 Commerce's general counsel, Andy Pincus. Andy has been
17 instrumental in facilitating the U.S. Government's
18 dialogue with industry and consumer representatives to
19 promote e-commerce. He's been in the very center of
20 the debate of how to approach the resolution of
21 consumer disputes in the cross-border context and how
22 to find a way out or around the complex and difficult
23 discussion of jurisdiction and applicable law issues
24 that e-commerce creates. We're very pleased to have
25 him here with us this morning. Please join me in

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1 welcoming him.

2 (Applause.)

3 MR. PINCUS: Thank you very much, and on behalf
4 of Secretary Daley, let me welcome you all to the
5 Commerce Department and say how pleased we are to have
6 you here and also to be jointly sponsoring this
7 workshop with our colleagues from the Federal Trade
8 Commission with whom we are privileged to work closely
9 on a number of issues, especially these issues arising
10 from the growth of e-commerce.

11 Hugh and Barbara have really put together a
12 great program I think in terms of gathering the experts
13 from both the business field, consumers, international
14 organizations, other governments, and identifying the
15 key issues that have to be discussed. So, I think that
16 we're in for a very thorough and hopefully productive
17 discussion of this issue.

18 I thought I would just talk for a minute about
19 the sort of wider context in which we at the Commerce
20 Department, at least, see this issue. One of the great
21 promises of the internet, as you all know, is that it
22 makes possible cross-border consumer transactions on a
23 scale that's never before been imagined. Consumers can
24 readily buy porcelain from France or spices from
25 Hungary or anything from anywhere on the globe just by

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1 clicking on a website and finding what they want.

2 But with these new opportunities, of course,
3 come challenges, because consumers won't use this
4 medium if they don't have confidence that they are as
5 protected shopping online as they are shopping offline,
6 and so that really is the fundamental challenge.

7 A consumer is not going to purchase a product
8 if he or she believes that there's no way to get
9 redress if that product is defective or, indeed, if the
10 product never arrives. The problem obviously is
11 compounded because of the cross-border nature of the
12 transactions and the fact that buyer and seller often
13 cannot only be at cross borders but very far away.

14 This isn't an unprecedented problem. Obviously
15 businesses have been engaged in cross-border commerce
16 for years, and they have worked out systems to deal
17 with these issues, but what really is quite different
18 from the business context is that in the consumer
19 context, there are many extra contractual remedies that
20 apply to those transactions in a way that often is not
21 true in the business context.

22 And so the question really is how to take that
23 system that's developed really in every country in the
24 world to provide consumers with extra contractual
25 protections and make it work in the cross-border

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1 context. And as I said, I think everyone agrees on the
2 goal, which is consumers have to feel safe. The
3 question is how to do it.

4 Traditionally, of course, the recourse has been
5 to judicial remedies, administrative and judicial
6 agencies and in administrative agencies or in courts
7 and typically in the consumer's country, because that's
8 where the consumer was doing business. But as with all
9 things, the internet forces us to challenge whether --
10 to confront the challenge of whether this traditional
11 way of resolving these issues works in this new
12 environment, and I think one of the things that we have
13 to do is recognize that the technology that enables
14 these transactions may also provide a new means for
15 resolving them in a quick, efficient and effective
16 manner that makes the traditional ways of resolving
17 them maybe second-best alternatives in this new
18 environment.

19 Let me talk a little bit about how people have
20 approached the traditional issues and then maybe why we
21 see these new approaches as holding great promise. The
22 traditional question in this debate has resolved around
23 what is the applicable law, which is the traditional
24 way lawyers like me and most of you would approach this
25 issue. Whose law applies to the transaction and where

1 can someone go, what court could someone go to to
2 obtain redress?

3 And really, the discussion has settled on two
4 models or two paradigms that might work. One is the
5 country-of-origin approach, which is the applicable
6 forum and the appropriate law should be that where the
7 merchant is located. The other is the country-of-
8 destination approach, which is that the consumer should
9 have the protection of the laws of his or her residence
10 and the right to go to court maybe even in that place
11 to resolve the disputes.

12 We see problems with both of those sort of
13 somewhat traditional approaches. A pure country-of-
14 destination approach obviously imposes tremendous
15 burdens on websites that want to deal with consumers,
16 and online business would have to comply with the laws
17 of hundreds of jurisdictions around the world and would
18 also have to be prepared to defend itself in hundreds
19 if not thousands of fora around the world. That
20 tremendous cost obviously would greatly deter the
21 growth of e-commerce and would impose a special burden
22 on small and medium-sized enterprises.

23 At the same time, a pure country-of-origin
24 approach makes it very difficult for any country to
25 ensure that its consumers have appropriate protection,

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1 because it could lead to a race to the bottom where
2 merchants decide to locate in the Cayman Islands of
3 consumer protection where there really is no protection
4 for consumers, and relying on a country-of-origin rule
5 would say, well, we're located here, so we don't really
6 have to provide any consumer protection for anyone, and
7 that obviously doesn't work for people in governments
8 who are charged with protecting the rights of
9 consumers, and it doesn't work for those who are
10 concerned about online commerce, because that will lead
11 to the erosion of consumer confidence that will hurt
12 the medium's development.

13 So, the question is, how -- let me add one
14 third problem to the traditional mix, which is a
15 question of practicality. Remedies really don't work
16 if they're theoretical and not real, and a theoretical
17 right to sue which forces a consumer to go to a
18 far-away forum or to engage a lawyer or to press his or
19 her claim in a place where it's costly to do so may
20 leave the lawyers to have a satisfied view of the
21 world, which is we've provided people with a remedy,
22 but may leave consumers pretty unhappy, because they
23 have a remedy that doesn't work.

24 So, the key question we think has to be
25 providing consumers with remedies that really work,

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1 that provide real protection, and that also are
2 practical for them to use, and that's really I think
3 the question for all of you to tackle in the next two
4 days, which is how to do that.

5 I think we've made a lot of progress on one
6 side of the equation, which is what should the
7 substantive rules be. Led by Commissioner Thompson at
8 the FTC for the United States, the OECD last year
9 produced guidelines for consumer protections in
10 electronic commerce that set a good substantive level
11 of protection. What are the protections that are sort
12 of fundamental that consumers have to have?

13 They call for the development of ADR, and so
14 really the next step is to say, okay, we have got these
15 protections, how are they going to be translated in a
16 way that consumers really can make use of them? And
17 that's your task today.

18 A number of private sector entities, BBB
19 Online, the Electronic Commerce and Consumer Protection
20 Group, have begun to translate those into consumer
21 protection processes. We hope that process will
22 continue. We hope, and as a number of people will talk
23 about in the next two days, other private sector ADR
24 systems will develop. Obviously we need to see some
25 experimentation and a process of trial and error to

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1 come up with a system that really meets all the
2 criteria that all of us want it to meet, but we think
3 that process has started, and we think the discussion
4 here in the next two days will contribute to that
5 process.

6 So, let me end there and say we're very happy
7 to be hosting this workshop. We're expecting a lot of
8 you. We certainly hope by the end of tomorrow we will
9 have fleshed out some issues and maybe begun to
10 coalesce around some of the ways forward, but we hope
11 that just having all of you in the same room will be a
12 catalyst for the continued development and moving
13 forward of these efforts in the private sector.

14 Let me now turn over the floor to Chairman
15 Robert Pitofsky of the FTC, who really is the leader --
16 certainly one of the leaders in the United States and
17 in the world in addressing the complicated problems of
18 consumer protection in electronic commerce in a way
19 that looks to very effective protection for consumers
20 but recognizes that things may have to be done a little
21 bit differently in cyberspace if that medium is to
22 succeed, someone who really works every day to find
23 that balance, and I know I can speak for Secretary
24 Daley and all of us at the Commerce Department in
25 saying how privileged we are to work with him and his

1 team and to welcome him here today, Chairman Pitofsky.

2 (Applause.)

3 CHAIRMAN PITOFSKY: Thank you, Andy.

4 Good morning, everyone. I'm delighted to be
5 here and to join Andy Pincus in welcoming all of you to
6 this conference on the role of alternative dispute
7 resolution in consumer transactions and especially in
8 the international marketplace.

9 The Department of Commerce and the FTC have
10 worked closely and constructively on a series of
11 e-commerce issues in the past, and I expect that this
12 conference on alternative dispute resolution will be as
13 informative and illuminating as our earlier efforts.

14 The problem that we address is a simple one,
15 yet enormously important. In a borderless e-commerce
16 marketplace, consumers will be purchasing and sellers
17 will be seeking customers in scores of far-off
18 countries with different legal systems, different
19 cultural traditions, different language. Invariably,
20 some of these transactions will go wrong. Consumers
21 will not get what they thought was the benefit of their
22 bargain; sellers will have difficulty collecting debts
23 on legitimate, completed transactions.

24 Also, conventional legal approaches may not be
25 entirely satisfactory. Requiring consumers to litigate

1 in a foreign country in most cases will effectively
2 deny them a remedy. On the other hand, requiring
3 businesses to defend lawsuits all over the world would
4 pose a significant burden, especially for small and
5 medium-sized business.

6 The challenge, then, and we've seen it in so
7 many different areas of e-commerce, is to ensure that
8 consumers have meaningful redress and at the same time
9 not produce that redress by putting such a burden on
10 electronic commerce that it will diminish the potential
11 of this wonderful new pro-consumer marketplace.

12 In an important sense, consumers and sellers
13 occupy a common ground. The consumers want a reliable
14 system. They want to have confidence that what they
15 get is what they paid for. The business community
16 wants consumers to have confidence so that the medium
17 will reach its fullest potential. And to an increasing
18 extent, I'm very struck by the fact that knowledgeable
19 people have looked to ADR as a way of achieving this
20 set of goals.

21 The FTC held a workshop on consumer protection
22 issues last year, and it was remarkable. All sectors
23 of the economy represented said we must examine ADR and
24 see if that's a way of solving some of these problems.

25 The OECD guidelines in electronic commerce

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1 issued in December of last year also pressed for, urged
2 an examination of ADR. This year, the Trans-Atlantic
3 Business Dialogue and the Trans-Atlantic Consumer
4 Dialogue each identified ADR as a priority issue. And
5 a few months ago, the European Commission held a
6 workshop examining ADR and expressed its commitment to
7 work with the United States Government on the issue.

8 As I said before, the internet is a profoundly
9 pro-consumer development. To achieve its full
10 potential, however, consumers must have a practical,
11 efficient way of resolving disputes, and as with other
12 e-commerce issues, cooperation among industry,
13 consumers and government is critical, especially when
14 the issues are international in scope.

15 These are the many difficult issues that need
16 to be addressed if ADR is successfully to contribute to
17 the development of electronic commerce. The next two
18 days should give us all an opportunity to explore the
19 promise of ADR and consider in detail how such a system
20 may be implemented. Speaking for the FTC, I look
21 forward to the opportunity to work with all of you in
22 this area.

23 Thank you.

24 (Applause.)

25 MS. WELLBERY: Thank you very much, Andy and

1 Chairman Pitofsky.

2 Before we begin the formal aspects of the
3 program, I wanted to cover a couple of logistics. We
4 have a number of staff here who can assist you if you
5 have questions. They are wearing yellow name tags, so
6 that's how you will know that they are the ones who
7 particularly can help you, but probably many people can
8 help you.

9 Lunch today and tomorrow is on your own. We've
10 provided a list of restaurants in your folders to give
11 you some suggestions.

12 We also wanted to announce that the deadline
13 for filing comments in response to our Federal Register
14 notice has been extended to June 29th. We had gotten
15 many requests from folks that we extend it, and so we
16 have done that.

17 I also wanted to give credit where credit is
18 due. Andy thanked Hugh and me, but the real credit for
19 this workshop goes to Kate Rodriguez and Maneesha
20 Mithal and Becky Richards and Lisa Rosenthal and a host
21 of other staff who put in really long hours. So, they
22 really deserve the credit for having pulled this whole
23 thing together.

24 MR. STEVENSON: Yeah, just to add, as Barbara
25 said, we have gotten a number of comments. We'd really

1 encourage everyone to submit any further thoughts they
2 have and especially thoughts that occur to you as you
3 listen to the proceedings and participate in them. One
4 of our goals is to try to be as open as we can in this
5 process. We have mikes in the aisles, and we will be
6 later having breakout sessions so that people can also
7 participate there, and we will transcribe that as well
8 as the general proceedings so that you can get your
9 comments in there.

10 Another logistical note is I guess in the
11 packets there is a colored sheet of paper that tells
12 you which breakout group you're going to be in, so just
13 make a note of that now so we don't lose track of that.
14 There's also in the packet not only the agenda but the
15 hypothetical, so that we thought it would be useful to
16 have just a concrete fact scenario that we could use in
17 thinking about the breakout sessions and also the -- as
18 we go along in hearing other presentations, it might be
19 useful in posing questions to just to have taken a look
20 at that and think about that.

21 We are going to start our show today with some
22 presentations on ADR to give some background and then
23 proceed after lunch to some panel discussions and then
24 some more panel discussions tomorrow and then the
25 breakout sessions and wrap it up tomorrow. And again,

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1 we encourage any input that you would like to have
2 either during those sessions or sidebar. I think with
3 the -- someone was asking what the coloring of the tags
4 meant, and I guess the yellow tags, for some reason
5 it's not mine and I guess not Barbara's, mean the
6 people are staff, so they will be glad to help you if
7 you have any questions about that.

8 One commercial message, since this is the
9 Department of Commerce, is that we also left out in the
10 materials a summary we had put together of the FTC's
11 workshop last year that Chairman Pitofsky referred to,
12 which puts some of this discussion in context. It
13 doesn't have a lot on exactly ADR, but as we heard from
14 both Andy Pincus and the Chairman, we are looking at
15 these issues in the broader context of how
16 jurisdictional rules work and the like.

17 I guess the last thing is the -- my wife is an
18 economist, and she's always reminding me, you know,
19 there's no free lunch, and actually Barbara I guess
20 reminded us there's no free lunch, but we do want to
21 thank USCIB, at least, for breakfast. With that, I
22 guess we will turn it over to the presentations.

23 MS. WELLBERRY: Thanks. I'd also like to
24 emphasize that we really encourage people to
25 participate. This is not a great physical setup for

1 people participating, but I think it will be a much
2 more interesting day -- two days if people do try and
3 overcome that barrier.

4 I'd like to introduce right now two speakers
5 who are going to provide us with some overall
6 background on ADR and why it's important to look to
7 alternative methods to solve disputes arising online.

8 First, I'd like to introduce Carol Izumi, who
9 is a professor at the George Washington University Law
10 School where she teaches and conducts research on
11 alternative dispute resolution. She also runs the
12 Consumer Litigation Clinic and the Consumer Mediation
13 Clinic at George Washington Law School. She's a
14 mediator and an arbitrator in the District of Columbia
15 and is an active leader in the American Bar Association
16 section on dispute resolution.

17 To her left is Hank Perritt, who is dean of the
18 Chicago-Kent College of Law at the Illinois Institute
19 of Technology. He is a leading expert on the
20 intersection of law and technology and has played a
21 major role in many of the discussions on electronic
22 commerce and policy that have come up. He was involved
23 in establishing the Virtual Magistrate Project, an
24 early online dispute resolution service that I think
25 was a great idea but one that came and went before its

1 time. He is the author of numerous books and law
2 review articles, most notably a book entitled Law and
3 the Information Superhighway.

4 Carol?

5 MS. IZUMI: Thank you, Barbara. Can you hear
6 me?

7 I was going to stand at the podium, but to pick
8 up on this notion of making it more informal, I think
9 I'll just stay here, and also I look taller if I'm
10 sitting down.

11 It's really a thrill to be here today, and I'm
12 very excited about this program. In fact, to express
13 my thrill of being here, I want you to know that I flew
14 back yesterday from Hawaii to join you for this two-day
15 program, and so if I yawn, it is not a reflection of my
16 interest in anything, it's just that it's 3:00 a.m.
17 island time, all right?

18 My role as the first speaker is to help you
19 with the transition from the offline world, which I
20 inhabit, to the online world, and I expect that most of
21 you have some familiarity with alternative dispute
22 resolution, but the planners did not want to assume too
23 much. So, my role will be to provide a basic
24 background overview of alternative dispute resolution
25 and to provide some basic definitions about processes.

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1 I don't have enough time in this particular
2 segment to go into a deeper discussion of some of the
3 controversies and issues surrounding a number of
4 dispute resolution developments that are current in the
5 field, but as you progress through the program, I know
6 that some of these panels will get into those.

7 Let's start by putting ADR or alternative
8 dispute resolution in an historical context.
9 Alternative dispute resolution refers to a legal
10 movement that is traced back to 1976 at what is called
11 the Pound Conference sponsored by the American Bar
12 Association, and sometimes you hear about the Pound
13 Conference also in relation to ADR.

14 The term was coined to reflect a
15 dissatisfaction with a traditional method of resolving
16 disputes, and that is judicial trials. That
17 dissatisfaction was based on a number of factors. One
18 is the time that it took to get a trial, many of you
19 already know that it takes six years to get a civil
20 trial in California; the cost of litigation, there has
21 been quite a lot of discussion about the high costs of
22 litigation in the U.S. today; the limited remedies that
23 are available through judicial trials; the ultimate
24 win-lose result of those trial situations; a feeling by
25 the parties that there is a lack of control over the

1 substance and the process of these trial methods; an
2 inability to bring up nonlegal considerations in that
3 forum; and probably some animosity toward the dominance
4 of lawyers in the traditional trial setting.

5 So, the alternative part of that name refers to
6 this notion that we want to get away from traditional
7 legal process. So, the focus of the ADR movement
8 really was to promote different kinds of dispute
9 resolution processes that might be more responsive to
10 the needs of the parties and provide a greater
11 satisfaction level.

12 Now, I think it's important in any discussion
13 of alternative dispute resolution to look at the values
14 behind ADR, and I think you'll see some of these themes
15 resonate throughout the conference, and, in fact, Mr.
16 Pincus mentioned one, which is the notion of the
17 practicalities of the remedies being of utmost
18 importance.

19 The first value is that of less government
20 intrusion, less government, less court control, a shift
21 away from a centralized power of the traditional
22 system, and I think there's a similarity to the
23 self-regulatory aspect of the internet.

24 A second value, faster processes and lower
25 costs; that is, more efficient methods of resolving

1 those difficulties we face to human interaction.

2 Number three, accessibility and flexibility in
3 dispute resolution. Accessibility and flexibility both
4 combine to address the needs of parties and communities
5 that might not look the same. The idea was to remove
6 constraints such as jurisdiction and standing. For
7 those of you who aren't familiar with civil procedure
8 terms in law, these are restrictive rules that limit
9 parties' abilities to literally get into court, and by
10 having dispute resolution processes that remove some of
11 the jurisdictional aspects and standing notions, it
12 broadens the scope of those processes. And this is
13 particularly important in the borderless world of
14 e-commerce.

15 The fourth value is creating a credible forum.
16 Now, what do I mean by that? Credibility in the sense
17 that the forum is seen by the users as one that
18 recognizes specific customs or usage, traditions, one
19 that recognizes differences among parties, and that
20 would be an acknowledgment of the tremendous diversity
21 among disputants and in the problems they face. Again,
22 you will see that resonated in the internet world.

23 Five, it's important that these processes
24 reflect individual user values. Now, that might be
25 particularly useful in thinking about the consumer

1 views of dispute resolution where you have principles
2 that go beyond legal principles. For example, there
3 might be relationship issues or notions of fairness,
4 and again, the practicalities of how a resolution might
5 affect a particular consumer that's different in a
6 particular world.

7 I happen to be doing some research now on
8 dispute resolution of consumer disputes in China, which
9 is, as you know, facing a new market economy. So,
10 that's the individualized consumer situation.

11 And six, very important, is confidentiality,
12 the concern that certain disclosures ought not be
13 revealed in the public forum or the parties' concern
14 that particular information not be revealed beyond the
15 individuals involved in the dispute.

16 During the past almost 30 years now, we've seen
17 a tremendous explosion in the literature about dispute
18 resolution, courses, publications, court and private
19 programs and in the number of practitioners that are
20 involved in ADR. More recently, that "A" in the
21 moniker has come to mean appropriate dispute resolution
22 as opposed to alternative dispute resolution, and I
23 think that's particularly useful to think about
24 traditional processes as something we still want to
25 embrace where appropriate. So, in my use of ADR, it

1 really means appropriate dispute resolution rather than
2 alternative.

3 We're also seeing I think a proliferation of
4 thoughtfulness and programs that focus on avoiding
5 disputes initially, and so you see collaborative
6 consensus-building projects and conflict resolution
7 programs that look at the avoidance initially.

8 All right, at this point I want to draw your
9 attention to a few of the key processes in the dispute
10 resolution area that I think you're going to be
11 focusing on in the next few days.

12 The first -- and many of you may not actually
13 think of this as a dispute resolution process, but we
14 see it on a regular basis, and that is negotiation, and
15 negotiation is defined as settlement discussions
16 entered into directly by the parties -- i.e., those who
17 have an interest in the particular dispute -- or their
18 representatives, and those conversations might also be
19 toward engaging in a transaction or a particular
20 activity.

21 Part of negotiation also includes a facilitated
22 aspect of it, which we called facilitated negotiation.
23 That would include a third party, such as a judicial
24 officer, typically the trial judge, who may have some
25 informal discussions with the parties really to focus

1 them on numbers. So, it's a very limited role. And I
2 understand that there is an online process called
3 CyberSettle which helps the parties narrow the ballpark
4 in terms of dollar amounts.

5 Then we have a group of third-party voluntary
6 processes, and I'm going to go through those briefly.
7 The first is conciliation, and conciliation is often
8 used interchangeably with mediation, but there really
9 is a subtle difference. For those of you who aren't
10 familiar, at 21st and K Streets here in Washington, we
11 have a federal agency that is called the Federal
12 Mediation and Conciliation Service, and it's a bit of a
13 redundant name, but the name reflects the inability of
14 Congress to agree on the title, so that's how we ended
15 up with FMCS.

16 Conciliation refers to a third-party process
17 where that neutral will engage in limited facilitated
18 discussions with a party towards some settlement. An
19 example in the consumer world might be the Automobile
20 Dealers Association, for example, which has staff as an
21 initial, entry-level attempt at dispute resolution,
22 will engage in telephone conversations with the auto
23 dealer representative and the consumer who purchased
24 the vehicle to try to resolve usually a repair or a
25 warranty issue.

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1 State attorney general offices use conciliation
2 to quite an extent, and in fact, many have mandatory
3 conciliation provisions in their state statutes.
4 Locally here, for example, the State of Maryland has a
5 mandatory conciliation requirement in their state
6 consumer protection act.

7 A related third-party neutral process is one
8 I'm sure you're familiar with called mediation, and
9 mediation takes that third-party neutral and gives him
10 or her a more sustained role in those settlement
11 conversations, and while it's a very informal process,
12 it is structured, there are distinct stages. The
13 mediator tries to help the parties identify their
14 priorities and goals, helps the parties identify and
15 narrow options and ultimately lead toward some
16 settlement or resolution.

17 There's been a movement or a philosophy that
18 has developed in the mediation field that we call a
19 transformative mediation, where the notion is to get
20 away from the idea of coming up with an agreement and
21 to use the mediation process really for transforming
22 the parties into being better at conflict resolution
23 management in their own particular situation. So,
24 that's a little bit different.

25 The mediator's role is to help the parties

1 fashion their own terms of agreement, not to impose or
2 decide the dispute. And really, the goal of the
3 mediator is to try to find what I call these
4 overlapping interests of the consumer, in this
5 particular context, and the business in resolution.

6 Generally the outcomes are nonbinding, but what
7 is interesting about mediated agreements is that the
8 research shows that mediated settlements are adhered to
9 at twice the rate of judicially imposed orders, and so
10 there's interest in the parties on adhering to their
11 own agreements.

12 Moving along the spectrum, we now discuss
13 arbitration, and the role of the neutral in arbitration
14 is really quite different from that in conciliation and
15 in mediation. In arbitration, that third-party neutral
16 now has decision-making authority, gets to render a
17 decision, and we know typically a third-party
18 decision-maker is the individual who wears black robes,
19 the judge or the judicial officer. In arbitration,
20 it's typically a less formal process, but it is in the
21 format of a hearing and not just conversations.

22 There's such variety within arbitration, it's
23 hard to make a lot of generalities, but let me make a
24 couple of broad statements.

25 The parties in arbitration, unlike in the

1 judicial trial setting, have some say in who that third
2 party is. So, you often get to pick from a list or
3 select from a certain panel.

4 Also, arbitrators are often individuals who,
5 while they have training and credentials in this
6 particular area, often have expertise and do things
7 other than just arbitrate full-time. So, you might
8 find, for example, I do arbitrations on a voluntary
9 basis for the Better Business Bureau. So, some of us
10 arbitrators have day jobs.

11 There are two aspects of arbitration that you
12 might want to consider. One is that some arbitrations
13 do lead to nonbinding decisions by the arbitrator; that
14 is, that the parties, if they don't like the decision
15 you make, will get what we call de novo trial, or the
16 decision of the arbitrator may be nonbinding on one
17 particular party. So, for example -- and I don't want
18 to steal the thunder from our Better Business Bureau
19 representative -- but, for example, in the BBB Autoline
20 program, the decision of the arbitrator is only binding
21 on the consumer if he or she elects to make it binding.

22 There are situations, however, in arbitration
23 where the parties decide at the beginning that that
24 arbitrator's decision will be binding, and one example
25 that's been with us for many years is in a consumer

1 context where you as a homeowner contractually agree to
2 hire an architect, and in the architect's retainer
3 contract, there will be language for disputes to go to
4 arbitration and for the parties to be bound by that
5 decision. In those binding arbitration situations,
6 those decisions can only be reviewed judicially on very
7 narrow grounds.

8 There's a hybrid process that I want to mention
9 very briefly, which is what we call med/arb, and it is
10 an abbreviation of mediation and arbitration. In that
11 hybrid process, it starts out where the neutral acts as
12 a mediator. If the parties are not able to invent
13 their own way of resolving the dispute, the mediator
14 then sort of switches hats, if you will, and turns into
15 an arbitrator who will render a decision.

16 And the last process I want to mention is that
17 of an ombudsperson, and you know, it used to be called
18 an ombudsman, and then that was sexist, so it became
19 ombudsperson, which was a little cumbersome, and so now
20 it's been shortened to an ombuds, and the role of the
21 ombuds is to be an independent third party. That third
22 party, though, is often not from outside brought into a
23 dispute but might be and is actually more likely to be
24 on staff at a particular corporation or at an
25 institution.

1 So, for example, here in the District of
2 Columbia, The Washington Post newspaper, one of our
3 large employers in the city, has an ombudsperson or an
4 ombuds to facilitate resolution of employee disputes.
5 You hear about the ombuds in a context now, nursing
6 homes, to help the patients, the residents, resolve
7 their complaints. And the job of the ombudsperson or
8 the ombuds is to receive complaints from those
9 individuals within that particular universe, to provide
10 information on resources and approaches, sometimes to
11 issue a report and to make recommendations or
12 suggestions on how that individual might resolve that
13 particular complaint. We see it a lot in the sexual
14 harassment now, as well.

15 Well, my time is up, and I hope I've just at
16 least primed the pump for later panels and
17 presentations and that you have some facility now with
18 using these particular terms and understanding the
19 background of ADR so that you can see how it might
20 apply to this particular world.

21 And I do want to add that in the physical
22 world, disputes are settled informally at a much higher
23 rate than they do going to trial. In fact, many of you
24 are familiar with the statistic that approximately 90
25 to 95 percent of all civil disputes do settle. So,

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1 this is particularly instructive as we look at the
2 online world.

3 And as Chairman Pitofsky mentioned, this is
4 really an opportunity over the next two days to look at
5 some of the potentials and promises that ADR provides
6 to the online world but also to look at some of the
7 pitfalls and to be very, I think, thoughtful and
8 contemplative about these processes.

9 Thank you.

10 MS. WELLBERY: Thank you very much, Carol.

11 You had mentioned some statistics that compare
12 the rate of adherence or compliance with mediation to
13 court imposed. Do you have any similar statistics in
14 comparing mediation and arbitration?

15 MS. IZUMI: The only one I heard is that in
16 mediation, the mediated orders are adhered to about 71
17 percent of the time versus about 39 percent of the time
18 for traditional orders. It's almost twice.

19 MS. WELLBERY: Thank you.

20 MR. PERRITT: Good morning.

21 I'd like to congratulate Professor Izumi for an
22 outstanding job of setting up an intellectual framework
23 within which we can think about dispute resolution. I
24 accept it as my own framework, and I would like to
25 focus particularly on the category that she called

1 arbitration.

2 Almost exactly ten years ago, maybe David and
3 Ron you remember what month it was in 1990, David
4 Johnson convened a series of informal seminars, and I
5 remember we used to meet in the evening over in a
6 conference room at Wilmer, Cutler & Pickering, and it
7 was David and Ron Plessner and Jerry Berman and me and a
8 couple of people from the industry, and this was,
9 remember, before the internet had extended into the
10 consciousness of anyone beyond the National Science
11 Foundation and its constituencies. It was in the days
12 of dial-up access to CompuServe and America Online and
13 Prodigy, but it was beginning to dawn on people that
14 this cyberspace thing might have some effect on
15 people's commerce and personal lives.

16 And in these informal seminars, we used to
17 struggle to think about how regulation would work in
18 this new kind of commercial and political space, and
19 instinctively, we were drawn to the idea that some kind
20 of self-regulation might be desirable for many of the
21 reasons that Professor Izumi identified and beyond.
22 And as we worked our way through it, we realized that
23 to have a system of regulation, whether
24 self-regulation, whether private, whether public, but
25 to have a system of regulation, you had to have some

1 component that would make rules, some component that
2 would apply and enforce the rules, and some component
3 that would make the enforcement meaningful.

4 We found it easier from that perspective to
5 figure out how the middle part, the application of the
6 rules, might work, because, after all, arbitration has
7 been well known to the international commercial
8 community and to labor and employment lawyers for
9 decades, and it wasn't long before, again prompted by
10 David Johnson and this time joined by the American
11 Arbitration Association and America Online and some
12 other people, when I was on the faculty at Villanova,
13 we set up an experimental online arbitration system
14 called the Virtual Magistrate.

15 It had a very limited purpose. It was aimed at
16 giving interlocutory opinions to an online service
17 provider accused of intellectual property infringement
18 or invasion of privacy, and Virtual Magistrate received
19 a lot of publicity. In its lifetime, it decided
20 exactly one case. It perhaps stimulated the settlement
21 of some half dozen or so more, but that's not a
22 high-volume dispute resolution machinery, but I think
23 we learned something.

24 Then as the decade continued, along with many
25 of you, I've participated in things like the conference

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1 we organized in the fall of 1997 to try to understand
2 what the right relationship was between formal
3 governmental agencies and emerging private dispute
4 resolution mechanisms. I served on a committee the
5 National Research Council appointed called Global
6 Networks and Local Values that's half German and half
7 American, and, of course, consistently the Federal
8 Trade Commission has done an outstanding job of hosting
9 workshops like this so that all of us can come together
10 and crystallize issues and learn more about
11 possibilities.

12 Now, based on this involvement over a period of
13 a decade or more, let me offer some observations and
14 pose some questions to you on three subjects. First of
15 all, on the importance of alternative dispute
16 resolution in cyberspace; secondly, on the qualities
17 that a dispute resolution system would have that would
18 make it particularly interesting to us; and third, a
19 little bit on the politics of all of this, or if you
20 are offended by the word "politics," we might call it
21 incentives.

22 First of all, why is ADR so important? Why is
23 it attracting so much attention? It seems to me the
24 most interesting regulatory structures that are
25 emerging for the internet are exemplified by the

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1 privacy safe harbor agreement that Barbara Wellbery has
2 done such an outstanding job of shepherding to the
3 point where all of the member states of the European
4 Union now have agreed to it. That is interesting
5 because it represents a hybrid framework within which
6 public authorities and public law sketch out a kind of
7 normalty floor and backup enforcement. Above the
8 normalty floor and before the backup enforcement is
9 triggered, there is a wide ambit of action for private
10 self-ordering regimes to work out the details and
11 accommodate the realities of technology.

12 Another very interesting hybrid regulatory
13 regime that has emerged and is operating is the ICANN
14 regime for assignment of domain names and internet
15 addresses. ICANN also is hybrid in the sense that
16 public authorities play a very general role in terms of
17 setting the ground rules, which were set in the
18 requests for proposal from the Department of Commerce a
19 number of years ago, and then delegate certain kinds of
20 governmental power to this private organization which
21 then works out the details.

22 Now, significantly, in both of these relatively
23 comprehensive examples of self-regulation, alternative
24 dispute resolution plays a major role. It does very
25 much in the safe harbor agreement, and it certainly

1 does in the ICANN arrangement, which has decided under
2 its dispute resolution procedures to adjust disputes
3 relating to domain names and trademarks already decided
4 some 400 cases, a much better track record than Virtual
5 Magistrate.

6 Now, in both of these hybrid regulatory
7 regimes, ADR figures prominently, because it is, if you
8 will, the teeth of self-regulation, and alternative
9 dispute resolution, as the regulatory teeth, is more
10 interesting than traditional judicial institutions for
11 many of the reasons that have been suggested to you
12 already this morning.

13 For one thing, the internet, because of its low
14 economic barriers to entry, enable small value
15 transactions, and as Chairman Pitofsky said, people
16 won't engage in small value transactions if they
17 anticipate disputes and if the cost of resolving the
18 disputes, the transaction costs, are so great that they
19 swamp the transaction. And, in fact, the justification
20 for alternative dispute resolution was expressed in the
21 following words:

22 "It was recognized that consumer disputes are
23 usually characterized by the fact that the goods and
24 services have low economic value compared to the cost
25 of seeking a judicial settlement."

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1 And in another expression: "Member states
2 shall ensure that in the event of disagreement between
3 an information society service provider and its
4 recipient, their legislation allows the effective use
5 of out-of-court schemes for dispute settlement,
6 including appropriate electronic means."

7 Those were not the words of an American law
8 professor or arbitrator; those were the words of the
9 European Commission. So, there is growing recognition
10 around the world that alternative dispute resolution is
11 important in cyberspace because we want the benefits of
12 the low-value transactions.

13 There are other reasons, as well. We are all
14 perplexed by how to solve personal jurisdiction and
15 choice of law problems in cyberspace. Some people
16 advocate law of origin, some people advocate law of
17 destination, everybody wants the home court advantage,
18 and it's difficult to resolve those conflicts, but if
19 you have alternative dispute resolution, resolving the
20 jurisdiction and choice of law conflicts becomes much
21 easier, because after all, virtually every private
22 international law system around the world allows party
23 autonomy with respect to choice of law and forum
24 selection, at least to some extent, with some important
25 exceptions for consumer disputes.

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1 Now, what this means is that if you have a
2 framework of self-regulation that includes alternative
3 dispute resolution, then you, the parties to the
4 transaction and the parties to ultimate potential
5 disputes, can yourselves resolve in advance the
6 jurisdiction and the choice of law problems.

7 But if it is important, then what are the
8 qualities that should interest us? Well, now, some of
9 the qualities are set forth in Article 17 of the
10 European Commission's e-commerce directive, and, in
11 fact, those same qualities are embraced for the most
12 part by the new agreement by the Electronic Commerce
13 and Consumer Protection Group, an industry
14 self-regulatory group that released a new agreement on
15 alternative dispute resolution and consumer protection
16 today.

17 Basically those qualities have to do with due
18 process. For those of you that are lawyers, you may be
19 familiar with Judge Henry Friendly's article, "Some
20 Kind of Hearing," published in 1976, but the way the
21 Europeans express them are independence, transparency,
22 respect for adversarial techniques, procedural
23 efficacy, legality of decisions and freedom of
24 participation and representation.

25 I would submit to you that there are also some

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1 practical features of alternative dispute resolution
2 systems that should interest us, and here I draw
3 especially upon the Virtual Magistrate experience and
4 some other early prototypical experiences.

5 First, the ADR system has to be cheap. We are,
6 after all, trying to lower transaction costs, and if we
7 have an ADR system that is as expensive to use as going
8 to the Superior Court in the District of Columbia, we
9 haven't achieved much.

10 Second, it's got to be simple, because what
11 we're doing is we're trying to improve consumer
12 confidence, among other things, in the trustworthiness
13 of e-commerce.

14 Third, and extremely important, it must be easy
15 to find the courthouse. In retrospect, I think the
16 biggest problem with the Virtual Magistrate system was
17 that nobody could find it. It wasn't that one couldn't
18 figure out the vmag.org URL. It was that the dispute
19 resolution system was so remote from the marketplace
20 that consumers and others had difficulty associating
21 the two and believing that the dispute resolution
22 system had credibility.

23 Now, what that means is, the criterion of being
24 easy to find the courthouse suggests that dispute
25 resolution systems that are directly linked to the

1 markets likely to produce the disputes that they will
2 resolve should be the ones most interesting to us.

3 And finally, it's important that the dispute
4 resolution system have some kind of fund or other
5 machinery for enforcement. If it just sits out there
6 by itself with no real linkages to any enforcement
7 mechanism, it can decide decisions until the cows come
8 home, and it won't make any difference to anybody. So,
9 if you have a system that is linked to a pot of money
10 that can be used to satisfy the decision or if it is
11 linked to people who have it within their hands to
12 deprive someone of valuable assets -- ICANN is a
13 perfect example of that, you lose your domain name if
14 you don't comply with the decision -- or if it is
15 linked to one of the participants or the participant
16 agrees in advance in some enforceable way to comply,
17 that's much more interesting.

18 Now, when you work your way through those
19 criteria, one dispute resolution approach stands out
20 above all the rest in my view, and that's credit card
21 charge-backs. Cheap, transparent, all the way through
22 the list. You've got a fund for enforcement. It's
23 linked to the marketplace, linked to the payment
24 mechanism that people already use for e-commerce, great
25 success rate. You can comb through Westlaw and Lexis

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1 until you're blue in the face, and it's almost
2 impossible to find a lawsuit growing out of credit card
3 charge-back mechanisms. And what that says to me is
4 that it's been sufficiently acceptable both to
5 consumers and to merchants that they don't sue about
6 it.

7 And I guess one of the things that mystifies me
8 a little bit is why the credit card companies have not
9 been prouder of their work and why they haven't been
10 more aggressive in taking advantage of what seems to me
11 a huge market opportunity, not only to extend the
12 dispute resolution business that they're already in but
13 to extend the use of credit card systems as the
14 principal payment mechanism for e-commerce in Europe
15 and Asia, as it already is in the United States, but
16 maybe that question will be answered in the panel this
17 afternoon when we talk about credit card charge-backs.

18 Now, a bit about politics. When we talk about
19 any kind of regulation, including self-regulation,
20 we're talking about government, and government, in a
21 democratic tradition, is political. But as I say, if
22 you don't like the word "politics," if it makes you
23 squeamish, then you can insert the word "incentives"
24 every time I use "politics."

25 I think what has been going on in the last

1 three to five years in trying to understand how to
2 achieve the benefits of e-commerce, while also
3 protecting people against crooks and bad actors, is
4 constructive in the sense that it has involved flexible
5 industry government cooperation.

6 One of the lessons that we surely have learned
7 is that the government has to push, but when it pushes,
8 it should be flexible and open to new ideas, as have
9 the Federal Trade Commission and has the European
10 Commission. It was almost five years ago that the
11 Clinton Administration made clear its commitment to an
12 open environment for e-commerce and to stay the heavy
13 hand of regulation. I have been a proponent in print
14 and in the classroom and elsewhere of self-regulation
15 for a lot longer than that, and so it's with some
16 disappointment that I say to you the pace has been
17 excruciatingly slow.

18 I think the Federal Trade Commission's Year
19 2000 Report to the Congress was right in saying that
20 there has been interesting progress, but the coverage,
21 at least by some measures, is disappointingly small if
22 we're looking for a reliable system to deal with
23 problems on a comprehensive basis.

24 It was many, many months after BBB Online was
25 announced when one could file a complaint with the

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1 Federal Trade Commission online, but you could not file
2 a complaint online with BBB Online, and even today,
3 when you go to the Federal Trade Commission site,
4 there's a button at the bottom of the top-level page
5 that takes you to a complaint form, and when you go to
6 the BBB Online site, you have to drill down three
7 levels before it even becomes clear that it's possible
8 to file a complaint online.

9 I think that the work that industry has done,
10 exemplified most recently by the E-Commerce and
11 Consumer Protection Group directive, is exemplary, but
12 I suspect that it would not have happened absent the
13 pressure from the FTC's Report to Congress recommending
14 legislation. I suspect -- I know that the progress
15 that we've made in privacy would not have happened but
16 for the pressure from the European Commission's privacy
17 directive.

18 And so I think that it is important for those
19 of you in government to have the courage of your
20 convictions to continue to exert pressure and to be
21 willing to criticize the industry efforts, but I think
22 it's equally important that you continue to remain open
23 and ready to embrace real progress by industry to
24 create credible alternative dispute resolution
25 provisions.

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1 I think on the industry side that we need
2 continued leadership, and that requires risk-taking.
3 The seven companies that signed onto the E-Commerce and
4 Consumer Protection Group issuance today took some
5 risks, and now the question is how quickly and how many
6 more companies will step up and sign on to this
7 framework or some other one? If you're in favor of
8 self-regulation, you have to be willing to put your
9 machinery where your mouth is.

10 Now, when we have done all this and even today,
11 I think it's fair to step back a little bit and to be
12 proud of what we've accomplished. I know when I was in
13 law school and studied administrative law and got
14 exposed a little bit to what was going on in 1939 and
15 1940 when people were writing the Administrative
16 Procedure Act, I sometimes ask myself, how is it that
17 those people were smart enough to kind of invent this
18 whole new conception of how government might work?

19 Well, if you think about it, that's exactly
20 what we're doing now, and I think Barbara Wellbery and
21 Hugh Stevenson and Bob Pitofsky and Jodie Bernstein and
22 the rest of you at the Federal Trade Commission have a
23 lot to be proud of in terms of your leadership, to
24 exercise your authority sparingly but constantly to
25 goad and prod and create opportunities like this for

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1 the rest of us to learn.

2 I think Becky Burr and Ira Magaziner at the
3 Department of Commerce have a lot to be proud of in
4 creating the ICANN regime. Ron Plesser and Roger
5 Cochetti I think can be proud of their handiwork that
6 was released today. And David Johnson certainly, as
7 someone said not long ago, is the father of most of the
8 ideas that we talk about in terms of effective
9 governance of cyberspace.

10 And there's a new generation of people that are
11 coming into their professional maturity to help us
12 think through the invention of new forms of government
13 for this new marketplace, people like Lisa Rosenthal,
14 Susan Crawford and Stu Ingis.

15 So, whatever the frustrations, whatever the
16 uncertainties about the right mix between public and
17 private government, between U.S. traditions and
18 European traditions and Asian ones, what we're up to
19 here is very important, very worthwhile, and I look
20 forward to continuing to work with you to accomplish
21 some good results.

22 Thanks.

23 (Applause.)

24 MS. WELLBERRY: Thanks, Carol, and thanks, Hank.
25 You've both laid out a very good foundation to work

1 from today and given us some good meat to chew on and
2 think about.

3 Now Hugh will introduce our next speaker.

4 MR. STEVENSON: The professor has exhorted us
5 in government to goad and prod and flexible push, and
6 we'll be doing that hopefully in our later panel
7 discussions. We have a few more presentations, though,
8 to put this in context, and our next speaker that I
9 have the pleasure to introduce is Charlie Underhill,
10 who is the senior vice president for dispute resolution
11 at the Better Business Bureau, and this means he's in
12 charge of a very large program.

13 The Better Business Bureaus in the United
14 States and in Canada have a wealth of experience in
15 dealing with consumer disputes. The professor
16 identified a couple of things that I think make
17 consumer disputes different, obviously we're dealing
18 with a lot of low-dollar transactions, small-dollar
19 transactions, and where the views of the dynamics of
20 party autonomy may work differently than in other
21 contexts, and the Better Business Bureaus have had some
22 experience in this area. Indeed, they have handled
23 consumer complaints and disputes, hundreds of thousands
24 of them, in the consumer context millions of them, and
25 initiated a number of new programs which people have

1 mentioned as we're talking today about dealing with
2 consumer complaints.

3 And I would like to take a moment also to
4 acknowledge one contribution that they have made
5 recently that -- mention of the consumer complaint
6 handling makes this relevant -- that we last month
7 announced a strategic alliance with the Better Business
8 Bureaus and the Postal Inspection Service, the state
9 attorneys general, along with a number of partners we
10 already had, you know, Susan Grant's organization, I
11 see her in the front here, and 90 Better Business
12 Bureaus representing over 110 different Better Business
13 Bureaus offices and cities had agreed to contribute
14 consumer complaint data to what's called Consumer
15 Sentinel, which is a joint database and law enforcement
16 tool that is available online to hundreds of law
17 enforcers and, in fact, 240 law enforcement agencies
18 and offices in the United States and Canada that can
19 use this information to take action against internet
20 fraud and deception, and this is an initiative we
21 appreciate very much.

22 One of the things that's interesting about
23 consumer complaints is that the line is sometimes
24 clear, sometimes not between what is just a problem
25 between legitimate parties and what is something that

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1 requires more decisive action from law enforcement.

2 So, with that thanks, I would like to turn it
3 over to Charlie to talk more generally about the
4 programs that the Better Business Bureau has.

5 MR. UNDERHILL: One should be tolerant of the
6 bottle of water that sits in front of one's chair.

7 If you will pretend that I told you the
8 obligatory humorous story and that you laughed
9 appreciably, we'll save about three minutes and I can
10 get on with this.

11 I want to start by kind of piggybacking on
12 something that Hank said. The bureaus in our comments
13 have made a point about the importance of kind of a
14 three-legged stool in this whole global consumer
15 protection arena, and as Hank said, one of them is a
16 set of standards by which companies and consumers and
17 dispute resolvers can measure the facts and
18 circumstances in an individual case.

19 One of them obviously is an effective
20 third-party dispute resolution mechanism, and one of
21 them is some way for consumers to identify which
22 companies have committed to these high standards of
23 dispute resolution and high standards of business
24 performance. So, we kind of see this as a three-legged
25 stool and that it's very important that all three legs

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1 be there, because they support one another.

2 That said, the conference organizers have asked
3 me to discuss the BBB Online's offline experience with
4 ADR. I was asked to provide some real world examples
5 of how at least one consumer dispute resolution
6 mechanism is currently operating and the nature of the
7 caseload that we're handling. And finally, I hope to
8 be able to set a stage for our discussions today and
9 tomorrow on consumer complaint handling in a borderless
10 online marketplace.

11 Let's start by making some general observations
12 about consumer complaints in the offline environment,
13 and I'm going to reference here some studies that many
14 of you are probably familiar with, sort of seminal
15 studies that were done by a TARP, that's the Technical
16 Assistance Research Program, back in 1979 and again in
17 1986 for the U.S. Department of -- or the U.S. Office
18 of Consumer Affairs.

19 The TARP study had some interesting
20 observations. I'm going to quote them here from an
21 article by John Goodman, who's the president of TARP,
22 that was published in Competitive Advantage in June of
23 last year.

24 "On the average, 50 percent of consumers will
25 complain about a problem to a front-line person,"

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1 however you define a front-line person, "but only 1 to
2 5 percent of consumers would escalate a complaint to a
3 local manager or corporate office," although for higher
4 ticket items, the percentage of people who do that is a
5 little bit higher. "Problems which result in out-of-
6 pocket monetary loss have high complaint rates," which
7 is understandable, "while mistreatment, quality and
8 incompetence problems invoke only about a 5 to 30
9 percent complaint rate."

10 On the average, TARP found twice as many people
11 talk about a bad experience in a commercial transaction
12 than they do about a good experience, and sort of
13 following that, TARP noted that it was five times as
14 expensive for a company to win a new customer as to
15 keep a current customer.

16 And finally, TARP found -- and this is
17 interesting to this discussion -- that customers who
18 complained and are subsequently satisfied are 8 percent
19 more loyal than if they'd never had a problem with the
20 company to begin with.

21 When North Americans do have complaints and are
22 looking for third-party assistance to help get those
23 problems resolved, they most frequently turn to the
24 Better Business Bureau. Let me give you some idea of
25 the BBB system's current complaint-handling activity.

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1 BBB Autoline is the bureau dispute resolution
2 mechanism operating under federal warranty legislation,
3 FTC rules, state lemon laws and manufacturer
4 guidelines. During 1999, BBB Autoline handled 33,000
5 cases. Of those initial contacts, 11,400, that's 34
6 percent, of these cases were ineligible for some
7 reason. They were ineligible or a significant portion
8 of these people withdrew their claim after they'd
9 presented it but before they did all the filings
10 because the complaint somehow got settled, and that's
11 confirmed in independent survey research that's done
12 annually for the program for the Federal Trade
13 Commission.

14 Of the remaining 21,600 cases, 5700, that's 26
15 percent, were resolved through an arbitrator's formal
16 decision, and roughly 74 percent, that's 15,900, were
17 settled through a process of mediation. Over the
18 lifetime of the BBB Autoline program, the BBB system
19 has handled an astonishing 1.6 million individual
20 consumer warranty disputes, and as I've indicated, the
21 majority of these cases were resolved to a customer's
22 satisfaction through a process of mediation, but
23 233,600 were resolved through formal hearings before
24 BBB trained volunteer arbitrators serving in local
25 communities in the United States. That's the BBB

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1 Autoline program.

2 Local BBB offices are the principal point of
3 contact for most consumer complaints. During 1999, the
4 BBB system handled slightly in excess of 3 million
5 consumer requests for complaint advice or assistance,
6 representing a 10 percent increase over the same
7 activity in 1998. These complaint contacts resulted in
8 420,000 formal complaint cases opened by local BBBs.
9 That's also a 10 percent increase. Of those,
10 approximately 66 percent were resolved, 8 percent were
11 answered but not resolved, 18 percent were not answered
12 by companies after repeated requests from the BBB, and
13 8 percent were not pursuable by the BBB because they're
14 not the kinds of cases that BBBs would handle.

15 To give you a better feel for a typical offline
16 case, we'll follow the BBB Autoline case from its
17 inception all the way through the BBB process. I have
18 chosen this because I think that within this process
19 there are a number of things that can be applied in the
20 cross-border online discussions we will be having today
21 and tomorrow.

22 First, a little background on the program
23 itself. In 1975 in the U.S., consumer dissatisfaction
24 with product warranties, and most specifically with
25 automobile warranties, had reached a boiling point.

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1 After several key studies of the problem, Congress
2 passed the Magnuson-Moss Product Warranty Act. The Act
3 created standards for full and limited warranties
4 according to coverages that each of these afforded and
5 required companies to describe each warranty as either
6 full or limited.

7 It provided that any warranties had to be
8 available in a variety of different ways for consumer
9 inspection prior to sale. And finally, and most
10 important for our discussions here, the Act recognizes
11 that a good deal of the consumer dissatisfaction over
12 warranties was really consumer dissatisfaction over
13 interpretations of warranty terms and the inability of
14 the court system to provide consumers with fast,
15 inexpensive third-party assistance. So, Congress
16 included in the Act a provision designed to encourage
17 warranters to resolve warranty disputes through
18 informal dispute resolution.

19 The Act specified that if a company established
20 a dispute resolution mechanism and if it met the
21 requirements of the FTC, then that mechanism could be
22 incorporated into a product warranty, and if it was
23 incorporated into the warranty, then the consumer could
24 not bring a case into court until they had first used
25 -- into court under the warranty act until they had

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1 first used the informal mechanism.

2 Coupled with the passage of state lemon laws,
3 most of which made reference to the FTC's informal
4 dispute resolution procedures, I don't believe there's
5 any single piece of consumer legislation that has had
6 such a profound effect on consumer-business landscape
7 and warranties as had the Magnuson-Moss Warranty Act.
8 We call a provision of Magnuson-Moss prior resort,
9 meaning that as a consumer you have to resort to the
10 mechanism before you can use the provisions of law.
11 You'll hear it discussed today also as exhaustion of
12 remedies, you exhaust other available options before
13 resorting to the courts.

14 BBB Autoline has over 34 manufacturers that
15 participate in some or all states, manufacturer brands,
16 and that includes General Motors and Saturn and most of
17 the major imports. Ford, Chrysler and Toyota offer
18 their own separate programs that are not connected with
19 the BBB.

20 Manufacturers are precommitted to resolve
21 disputes through the BBB, and if a case has to be
22 arbitrated, the arbitrator's decision is not binding on
23 the consumer unless the consumer accepts the decision,
24 and if they do, then both the manufacturer and the
25 consumer are bound by its terms.

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1 So, let's go to a typical case. You're the
2 consumer and you probably fit this model. You've
3 experienced a problem with your car, it's manifested
4 itself in one of two ways, either as a single problem
5 that keeps recurring or as a number of separate,
6 apparently unconnected problems that keep you coming
7 back to the dealer over and over again. Your level of
8 frustration builds in direct proportion to the number
9 of times you've taken your car back. Your car is
10 relatively new, it's still under warranty, and every
11 month your frustration increases because you're making
12 lease or loan payments on that vehicle.

13 You've probably discussed your problem with
14 either the service manager or manufacturer's
15 representatives, and they've offered to assist you by
16 having another repair attempt. Finally, you reach the
17 breaking point, and as the studies show, the breaking
18 points are different for different consumers, and you
19 get hold of the Better Business Bureau.

20 How you find the BBB holds some lessons for us.
21 As a result of the warranty legislation, manufacturers
22 have incorporated information on informal dispute
23 resolution into the warranty material that accompanies
24 the vehicle, so you may have found the BBB Autoline
25 number there. And this goes to a point that Hank has

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1 made about how important it is to be able to link the
2 customer with the dispute mechanism at the point of the
3 dispute.

4 The legislation also requires manufacturers to
5 make information on their mechanisms available when a
6 dispute arises. Repeated independent audits of our
7 mechanism and of the Ford, Chrysler and Toyota
8 mechanisms have noted that -- have encouraged the
9 manufacturers to put this information at the service
10 desks in dealerships, and I have to say that this is
11 almost never done, and that's the real point of contact
12 where the consumer is most likely to have a dispute.

13 So, most consumers find their way to Autoline
14 either through the warranty material or because they
15 call the Better Business Bureau because they think
16 that's the place they need to go with a complaint, and
17 the bureau will refer them to one of these programs.

18 We cover most U.S. consumers, so depending on
19 the individual manufacturer, we may handle a case
20 originating anywhere from the U.S. Virgin Islands and
21 Puerto Rico all the way over to Hawaii and from the
22 U.S.-Mexican border all the way up to Alaska. There's
23 a separate program, by the way, called the Canadian
24 Motor Vehicle Arbitration Program that does kind of
25 similar functions through the BBB and other dispute

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1 resolution providers in Canada.

2 We'll mail you a whole package of materials
3 when you contact us, including the Autoline rules, a
4 copy of the standards and remedies for your individual
5 state's lemon laws, copy of program summaries, a whole
6 bunch of material to assist you in filing your claim
7 and will take your claim over the phone. When we mail
8 you this package, we also notify the manufacturer that
9 a case has been filed and the name and the basic
10 information on the complaint. Many manufacturers are
11 excellent at rapidly responding to these case
12 summaries, and it's not unusual for a manufacturer to
13 contact the customer and perhaps even offer a
14 settlement before the paperwork has actually arrived
15 from the BBB through the snail mail.

16 We use a very sophisticated document imaging
17 system to create electronic copies of all claim forms,
18 program documents and other supporting materials.
19 Within the first ten days of your complaint filing,
20 your BBB case specialist, whose name you got and
21 telephone number when you initially called us, is going
22 to contact you and the manufacturer to try to work out
23 some kind of an informal settlement or to better define
24 the nature of the dispute.

25 Because, as I had indicated earlier, FTC rules

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1 require that a case be handled from beginning to end in
2 40 calendar days, not business days, we need to
3 schedule your case for an arbitration hearing starting
4 about day 17. We offer you the opportunity as a
5 consumer to present your case in a number of ways. Our
6 process assumes you want to present your case in person
7 to an arbitrator. A manufacturer may elect to
8 participate by telephone or in writing, but you can
9 participate if you want to in person.

10 If you elect to present your case by telephone,
11 the manufacturer can't appear in person. They have to
12 appear either by telephone or in writing. And if you
13 choose just to submit your dispute in writing, the
14 manufacturer can only respond by submitting in writing.

15 You've elected to have your case heard by an
16 in-person hearing, so we'll schedule a hearing for you
17 at a local BBB office nearest your home, and there
18 150-some offices and branches in the U.S., so we're
19 pretty close to most consumers.

20 In some cases, we'll arrange to have your
21 vehicle inspected prior to the hearing, and that will
22 be done at no cost to you, and the results of the
23 inspection by an independent technical expert will be
24 provided to you and the company and the arbitrator
25 prior to the hearing. The arbitrator can also request

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1 an inspection after the hearing if he or she believes
2 that there's some problem that would help be clarified
3 by a technical inspection.

4 When the appointed hour arrives, your hearing
5 is going to take place at the local office. The
6 manufacturer may participate by telephone. Most
7 hearings take 60 to 90 minutes. The arbitrator, a
8 volunteer trained by the BBB, will have been provided
9 as much information as we have been able to gather from
10 the parties prior to the hearing; copies of sale and
11 lease agreements, record of the customer's ownership of
12 the vehicle, repair orders, et cetera, and you can
13 present any evidence that you want, and so can the
14 manufacturer.

15 If you are requesting a repurchase of your
16 vehicle, the arbitrator will in most cases inspect the
17 condition of the vehicle at the time of the hearing,
18 and that inspection may include a test drive of the
19 vehicle if there's some particular problem that you're
20 alleging is recurring and the arbitrator wants to get
21 firsthand view of that.

22 When the arbitrator has determined that they
23 have gotten all the evidence, they will close the
24 hearing, and they have a very short time frame in which
25 to issue a written decision and the reasoning for their

1 decision. When that comes to us, we send it to the
2 parties, and you have ten days from the date you get
3 our mailing to accept or reject the decision. Let's
4 assume that you've won your case and you've decided to
5 accept the decision, there's been an order that the
6 vehicle be repurchased. Well, in that case, the
7 manufacturer will normally have 30 days from the date
8 of the decision to actually do all the work necessary
9 to repurchase the vehicle. That's normally done at the
10 dealership, and that's probably going to conclude your
11 case.

12 One of my major functions here is to provide
13 you with a segue from offline stuff to online stuff in
14 the ADR world. Let me begin by noting that the
15 internet has already profoundly changed the way we do
16 business, for the BBB system offline and online
17 emerging at a pretty breakneck pace, and while Hank is
18 correct that it's -- we've noted this and we're taking
19 steps to correct it -- it's difficult to find the BBB
20 complaint form on the BBB Online site, on the BBB.org
21 site, which is the principal site that consumers come
22 to, the complaint form is prominent on the splash page.
23 It's basically file a BBB complaint other than a new
24 car, file a BBB complaint on a car, file a complaint on
25 a charity, and those are right on the splash page.

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1 People are finding that.

2 As I mentioned earlier, the BBB system handled
3 420,000 complaints last year. During the first five
4 months of 2000, we took 67,000 complaints from
5 consumers using the online complaint form. If that
6 five-month number is extrapolated over 12 months, we
7 will have taken 160,000 online case filings for the
8 year 2000, and that's assuming that it stays at an
9 average of about 13,000 per month. It's not. It's
10 increasing almost exponentially every month as more and
11 more consumers come online and find the form. So, 40
12 percent of the bureau system's 1999 caseload, by the
13 year 2001, will probably be coming online.

14 A growing number of the Autoline cases are
15 filed online as an increasing number of consumers gain
16 access to the internet. More and more consumers are
17 communicating with our BBB Autoline staff by e-mail
18 rather than by telephone, and that's eliminating one of
19 our real problems, which is playing phone tag trying to
20 catch busy, working consumers during the business day.

21 Most consumers have access to fax machines
22 today, and when a consumer faxes documents to us,
23 they're really not faxing documents. They're engaged
24 in one part of a document imaging system, because their
25 stuff is coming right into our computers and into our

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1 document imaging system.

2 I expect that very shortly the consumers and
3 manufacturers will be able to have direct access to all
4 of the material that they filed on an individual case,
5 as will the arbitrators. Through our website,
6 consumers can obtain copies of their own state's lemon
7 laws, standards and remedies, and review participating
8 manufacturers' program summaries and can obtain all
9 kinds of information about the BBB program. And
10 finally, the BBB Online dispute resolution process for
11 the privacy program, which is now online, was built
12 from its inception to be an entirely online process.

13 Let me come back to the TARP statistics I
14 mentioned at the beginning and ask, will they still
15 have validity in this new online marketplace? It's my
16 educated guess, given the one-click ease with which
17 consumers can bring a dissatisfaction to someone's
18 attention, that more consumers will do so.

19 I'm also convinced that many more consumers
20 will find ways to escalate unresolved disputes, either
21 to companies or third parties. And finally, I'm
22 absolutely convinced the TARP statistics regarding the
23 impact of a negative customer experience are probably
24 already outdated as consumers post their
25 dissatisfactions in chat rooms for the world to see and

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1 create the best awful problem with manufacturer A
2 website, which will come up every time you do a search.

3 TARP action, which is now known as e-satisfy
4 and which sort of reflects the change in their
5 environment, they moved from offline to an online
6 world, just completed a benchmark study in 1999 in Dune
7 for the International Consumer Service Association, and
8 they have some observations about how things are
9 different in the online environment.

10 Online customers have a higher expectation than
11 offline customers for the time it takes a company to
12 respond to them to and resolve their complaints.
13 Companies are not only meeting online -- companies are
14 not currently meeting online customer expectations.
15 Only 36 percent of online customers are completely
16 satisfied with their electronic contact experience.
17 Only 40 percent of online contacts are resolved with
18 one contact, and almost half require a telephone call
19 from the consumer to resolve the problem.

20 Poor handling of online contacts creates at
21 least 30 percent lower loyalty among the two-thirds of
22 online contacts who aren't satisfied. And finally,
23 poor handling of online contacts results in a high
24 level of negative word of mouth.

25 This survey, this e-satisfy survey is available

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1 through the International Consumer Service Association,
2 and you can order it online.

3 This is not particularly good news for
4 companies operating in the exploding e-commerce
5 marketplace; however, it does speak to the real
6 importance of our collective work. It seems that what
7 we're going to do is going to be needed.

8 There are many challenges we face in building a
9 global mechanism. Some of them are so obvious --
10 language barriers, cultural differences, levels of
11 technological sophistication -- that they are hardly
12 worth mentioning. We will discuss them at great
13 length, but they are just a fact of life. Others are
14 less obvious but may prove more difficult.

15 The first and foremost one, I believe, and
16 borrowing from the "Field of Dreams" analogy, "If you
17 build it, they can come, and in droves," and that in my
18 judgment may not be the first challenge of global ADR
19 mechanisms, but it will ultimately be the most
20 significant. There have been a number of experiments
21 in online dispute resolution. Hank referred to some of
22 them; you will hear three in the next presentation.
23 All of these have a solid intellectually designed
24 framework.

25 Overall, online mechanisms, however, are only

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1 beginning to be tested for the consumer arena in any
2 significant volume of casework, and I can tell you from
3 firsthand offline experience that when you combine an
4 organization with a 99 percent public name recognition,
5 like the BBB, with a group of major consumer product
6 manufacturers in a dispute resolution mechanism
7 overseen by a major federal regulatory agency like the
8 FTC, you can indeed get a quarter of a million case
9 filings in 12 months, as we did during the mid-1980s
10 just in the Autoline program, well before anybody had
11 heard of the Worldwide Web.

12 While technology can assist in making caseloads
13 manageable, it also has a real and positive potential
14 to make ADR more accessible, and at some point, however
15 effective the mechanisms are, dispute resolution is
16 going to involve the active intervention of a third
17 party by real people at some point, and the costs of
18 doing that have the potential of being significant.

19 Second, thoughtful regulatory involvement can
20 provide a fertile medium for ADR growth without huge
21 budgetary commitments. As I've said, the best possible
22 example of this judgment from a cost-benefits
23 standpoint had to be the ADR provisions of Mag-Moss.
24 We need to look for similar exhaustion of remedies
25 approaches online.

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1 Third, responsible businesses will do the right
2 thing with the right incentives, and that's another
3 point Hank's made. A number of businesses will do the
4 right thing because it's good for business and it's
5 good for its customers, and they will do it without any
6 need for regulation. A good example of that is the
7 companies that have participated in a variety of these
8 different programs, including the BBB Online program,
9 and the Children's Advertising Review Program in our
10 National Advertising Division.

11 Others will do the right thing when the rules
12 that require it are clear and focus on desired outcomes
13 and not trying to define line by line what the process
14 ought to be, allowing latitude for business, for form
15 to fit the forces, as Professor Frank Sander would say,
16 forces particularly in the cross-border consumer
17 process, which relies on contractual provisions, and
18 legal enforcement mechanisms to compel participation in
19 a legally binding mechanism by itself is likely
20 impractical and unworkable. It has certainly caused
21 considerable consumer controversy in the U.S. You will
22 probably hear more about this issue over the next
23 couple of days.

24 Ultimately, given the relatively small value of
25 disputes which are likely to make up the bulk of the

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1 consumer caseload, I don't believe either businesses or
2 consumers will want to expend the financial resources
3 which might be necessary to compel one reluctant party
4 to arbitrate or to bring a country's enforcement
5 mechanisms to bear to collect on an unsatisfied
6 judgment.

7 In closing, let me say that the BBB system in
8 the U.S. and Canada can provide a model of how consumer
9 dispute resolution programs operate offline and could
10 also be an excellent laboratory in which new concepts
11 and technologies can be tested with a significant body
12 of real consumer disputes. We're actively exploring
13 partnerships with other groups around the globe, and
14 we're anxious to lend our over 85 years of experience
15 and self-regulation are the goals of this meeting.

16 Thank you.

17 (Applause.)

18 MS. WELLBERRY: Thank you, Charlie, for the
19 excellent presentation.

20 We are now going to take a 15-minute break.
21 I'd like -- if I could ask you to come back at 10 to
22 11:00. We have a very busy schedule, so -- I know
23 everybody needs to get up and move. I also want to
24 point out that Pronet link will be webcasting the two
25 days of the workshop. The exact time of the webcasting

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1 has not yet been determined, but if you look at our
2 website, we will be announcing the times.

3 (A brief recess was taken.)

4 MS. WELLBERRY: Our next session is going to
5 involve three presentations by entrepreneurs who have
6 led the way in developing online models for settling
7 business-to-consumer disputes. First we will have
8 Steve Abernethy of SquareTrade who will tell us about
9 their experiences as a third-party resolution provider
10 for ebay, the world's largest online auction site.
11 Then we'll have Jim Burchetta, who will describe
12 CyberSettle.com, which employs a patent-pending
13 technology to settle monetary disputes, such as
14 insurance claims. And lastly, we'll have Clyde Long
15 who's the founder of iCourthouse, and he will explain
16 their system of online jury trials in both public and
17 private forums. And we'll start with Steve, and --
18 thank you.

19 MR. ABERNETHY: Hi, I'm Steve Abernethy. I'm
20 the CEO and one of the co-founders of SquareTrade, and
21 I'm very honored to be here and to speak to you all,
22 and I really hope to be able to demonstrate some of the
23 key points that have been made in the opening remarks.

24 As a background, I just want to give you what
25 we are and how we've started before I step into the

1 demo of our solution specifically within ebay.

2 SquareTrade is a venture-backed startup based
3 in San Francisco, founded back in September '99. We
4 have grown to about 50 full-time employees and a
5 network of over 200 mediators. We -- SquareTrade
6 launched its services a little over three months ago in
7 a pilot program with ebay, which as Barbara introduced
8 and most of you know is really the world's largest
9 online marketplace with over 13 million buyers and
10 sellers reported at the beginning of the quarter, and
11 I'm very happy, in conjunction with at least one member
12 of ebay in the audience, to report that our experience
13 and our solution as a real example of online dispute
14 resolution working in practice.

15 In addition to ebay, SquareTrade is just
16 launching and extending its services to other
17 marketplaces. We will -- well, we are now live with
18 Onvia, one of the internet's largest small business
19 focus marketplaces.

20 At a high level, SquareTrade provides a
21 critical piece of e-commerce infrastructure, creating
22 trust in transactions. SquareTrade is applying to the
23 marketplaces that we partner with a process of problem
24 resolution that's founded in mediation and negotiation
25 that has the really important elements of an online

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1 solution. It's visible, it's highly credible, it's
2 highly close to the transaction through the
3 partnerships and the placement within the marketplaces
4 that we work with, it's obviously very neutral, and
5 it's accessible and affordable.

6 The other aspect of our solution, getting to
7 some of the things that Hank said, is it's establishing
8 a process to protect and project reputations, and
9 within the context of ebay, which has established a
10 very powerful thing called user feedback, is one of
11 those elements. So, I'd like to talk about how
12 important that is in conjunction with the underlying
13 dispute resolution system.

14 So, together we're learning the important
15 combination of dispute resolution and symbols of trust
16 to both -- well, to do three things; resolve disputes,
17 which we are doing today, prevent disputes, and create
18 confidence in transacting online.

19 So, I'm going to take you through the solution
20 that we have specifically as it's deployed in ebay. As
21 an overview, really SquareTrade's founded on three
22 important assets, technology, the network of mediators
23 and arbitrators we've assembled, and the underlying
24 expert leadership that has gone into building our
25 system and continuously improving our system.

1 From a technological perspective, I will just
2 point out a few things that we have found to be
3 essential for online dispute resolution, and the first
4 point is that people expect it. Users of online
5 marketplaces are expecting 24/7 access to a complete
6 solution, the ability to interact, to file a dispute,
7 to respond to a dispute, to get information, and this
8 is, you know, a clear case of where we're able to do
9 that.

10 The second thing is that it enables scale. It
11 enables a scale in cases, enables a scale of across
12 marketplaces, and as a tool to deploy the solution and
13 leverage a multitude of mediators as part of the very
14 service side of the solution.

15 And the other thing that I alluded to before is
16 the complete nature of the solution. In order to
17 provide -- as we've learned, in order to provide an
18 effective online dispute resolution solution, it goes
19 far beyond just the mediation interaction. It starts
20 at the point of being able to help people articulate
21 the problem, in many ways holding their hand through
22 the process, both through technological tools and
23 customer service, as well as ushering them through and
24 guiding them through a resolution process.

25 The second aspect of our assets is our mediator

1 network. We have over 200 mediators today across 43
2 states in three countries. We've already solved
3 cross-border and multi-lingual disputes, and we've also
4 -- within the network we have areas of expertise that
5 we will be deploying very shortly in key areas that
6 will be relevant online, including intellectual
7 property, international commercial disputes and
8 arbitration.

9 The other important aspects of our mediator
10 network is -- is another thing that previous speakers
11 have talked about, is the importance of quality and
12 consistency of the overall service and the standards
13 underlying that. So, we have a very strong set of
14 standards before a mediator can join our network, a
15 pretty rigorous training program that takes their
16 traditional offline skills and helps them learn how to
17 deploy that online, and then a very active quality
18 control process.

19 And then the last aspect, which I've alluded to
20 before, is about scalability. Just with our 200
21 mediators today, in conjunction with the solution,
22 we're capable of doing thousands of disputes
23 concurrently on a weekly basis. And so this is really
24 just the beginning of the ability to really reach out
25 and actually solve the overall explosion of commerce

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1 and being able to grow to meet it.

2 The last aspect, which is critical both from
3 the credibility side and just overall execution, is the
4 expert leadership that we've assembled in our team from
5 very early days. In this room you'll recognize David
6 Johnson and Ethan Katsh as really the leaders in this
7 area, both in terms of thought and early trials, and
8 they have been really quintessential for us to take
9 something from a relatively vague concept into a very
10 scalable, very essential process.

11 We've also included mediation experts both
12 within the panels as well as experts in academics,
13 including Roger Fisher and Janet Rifkin, and Janet is
14 also in the audience today.

15 And then the other aspect, which is obviously
16 much more relevant to this group from the consumer
17 side, is making sure that a solution is very tailored
18 towards the key issues of consumer protection, and this
19 is why we've included Ken McEldowney from Consumer
20 Action as part of our advisory group.

21 So, with that said, I am going to take you
22 through a -- our solution as it sits within ebay, as it
23 really is an exciting thing from an e-commerce startup
24 perspective is it benefits all parties. It's really a
25 value-creating things to both buyers and sellers in the

1 marketplaces which we work with.

2 Our solution, to draw this back to the
3 different models that were talked about this morning,
4 is a two-step process. The first step on the left is
5 what we call direct negotiation, and this is a
6 primarily automated set of tools and processes to
7 actually help buyers or sellers, whoever is filing the
8 dispute, communicate the issue to the other party, and
9 that alone is one of the biggest hurdles in actually
10 solving any form of dispute.

11 The other aspect is it brings the other party
12 to the table and provides them a forum in which to
13 actually try to work the problem out on their own. And
14 going back to the point I made about reputation, this
15 is one of the most powerful enforcement mechanisms out
16 there, and the first automated component of our
17 solution in many ways helps to scale and automate this
18 process of protecting reputation, preserving
19 relationships between buyers and sellers.

20 On ebay, a seller with a negative feedback
21 rating is, you know, very hurt. I don't care if you
22 have hundreds of successful transactions, a bad one is
23 a very bad thing. Protecting that is just as important
24 a large business protecting their reputation.

25 The next phase of our solution then moves to a

1 mediated resolution, where a mediator is assigned to
2 the case and conducts an asynchronous process of
3 traditional mediation, working towards identifying
4 possible outcomes and working with both parties to
5 reach that. So, I'll actually take you through what
6 that physically looks like today.

7 So, the first point is easy access. So, we've
8 worked with ebay to present our solution in multiple
9 areas of ebay's experience as relevant. So, within
10 their customer service area, within their seller/buyer
11 services, you can see that dispute resolution is one of
12 the opportunities available for you.

13 From there you click to a jump page, which
14 explains the overall relationship, and then that
15 connects us to SquareTrade's homepage. From here the
16 experience is a couple of things. First of all, we --
17 at this stage, mediation is still a relatively a new
18 phenomenon for most consumers out there, so a lot of
19 our text and functionality is about education and
20 getting people feeling comfortable about the overall
21 solution.

22 At this point, we'll go through someone filing
23 a case based on reality, which both parties were
24 comfortable letting us share this with the public to
25 talk about the opportunities. So, once you actually

1 enter into a secure area where you're given a password,
2 you first read our user agreement, which basically says
3 this is a completely voluntary process and that the
4 information you are presenting is held completely
5 confidential with SquareTrade, the other party and the
6 mediator involved in the case. And this is all
7 contained within a case page which is hosted on our
8 site and password-accessible by mediators and the
9 users.

10 The next part of the experience is about
11 facilitating communication, identifying the situation.
12 So, who is the other party? In this case it's a buyer
13 dispute against a seller for a leather overstuffed
14 chair that was musty and smelly, slightly different
15 from the description in ebay, and in this case, the
16 buyer really wants to have the item returned and money
17 back. And the interface here with about nine buttons
18 is an important part of our solution.

19 What we've done is we've created really the top
20 types of disputes or complaints that occur on ebay as a
21 means to actually help people articulate the problem,
22 as opposed to a somewhat unstructured venting process.
23 We give them that unstructured ability below, but just
24 by being able to articulate the issue is really a long
25 ways forward in actually meeting a successful

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1 resolution.

2 This then dynamically generates outcomes,
3 potential outcomes that, again, are statistically tied
4 to the most common outcomes for each type of these
5 disputes. So, again, it helps the complainant
6 articulate the issue. So, for example, for the problem
7 of the merchandise was damaged when I received it, for
8 this problem, what solution would you accept? So,
9 we've given the top five commonly chosen outcomes.

10 In this case, Stephanie has chosen I would be
11 satisfied if I could return the merchandise for a full
12 refund. So, basically this party really wants their
13 money back, and with some detail added below, I'm not
14 satisfied with the chair, and I'd like it back.

15 So, on filing the case at this point, we then
16 automatically generate an e-mail which is sent to the
17 other party alerting them to the notion that the case
18 has been filed, that it's -- it's explained at a very
19 high level the nature of mediation, the nature of the
20 neutrality and all the really critical issues that
21 we've learned over time are important for the other
22 party to receive, because this is again something that
23 most people don't experience.

24 They are linked then back to the case page, and
25 they have the ability to review the basic issues of the

1 \$700 leather overstuffed chair which Stephanie has
2 input. So, basically this is just a summary of what
3 was presented before.

4 At this point, the respondent, in this case the
5 seller, has the ability to respond, and again, they
6 also must read the user agreement, and the interface
7 then creates the opportunity to respond directly to the
8 points that were made by the person who filed the
9 complaint with an easy identity of what the complainant
10 would like to have as a resolution.

11 In this case, there is a clear difference of
12 opinion. The seller says it didn't have a musty smell
13 and it was exactly as described, and so that's their
14 response to the case.

15 This is then assembled then collectively into a
16 case page. So, all the information is collected in one
17 area, where both parties can view, and multiple options
18 ensue.

19 At this stage, what we're still trying to do is
20 facilitate direct negotiations, facilitate
21 communication, because we really believe in the end
22 that's the most effective form of resolution. So, we
23 give them the opportunity to, within the confines of
24 our environment, communicate with each other.

25 You also have the opportunity to request a

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1 SquareTrade mediator, and actually, if you actually
2 come to a successful settlement between the parties,
3 you can opt to close the agreement right here. So, in
4 this case the parties want to attempt to go back and
5 forth. So, then there's the second level of drill-down
6 within the case page, which is around the history of
7 communication, so both parties attempting to really
8 explain their issues to each other and us containing it
9 in a given area.

10 So, basically Stephanie is saying, hey, I
11 understand that the chair was used when I purchased it,
12 but it's not what I thought it was going to be. The
13 other party disagrees that it wasn't like that when
14 they sent it. There's clearly a difference of opinion,
15 and a mediator is requested by one of the parties.

16 So, at this point one of our SquareTrade
17 mediators is assigned to the case, and what we've
18 learned over time is actually using our tool to
19 introduce the case with a grounding mechanism of what
20 is a successful way to mediate online. So, here Isha
21 Asaad (phonetic), who is our mediator, really lays out
22 the ground rules and lays out the important things that
23 need to happen to actually have a speedy resolution.

24 I think it's actually a good point to point out
25 the value of asynchronous communication, both in

1 consumer situations as well as in business ones. While
2 it's actually not solved in a given setting, the
3 overall process generally takes place in a sort of two
4 to three-week time period, from the direct negotiation
5 all the way through a mediated settlement, and if you
6 look at this as compared to any other alternative, it's
7 incredibly, incredibly fast, and also going back to the
8 theme of expecting continuity and quick resolution.

9 The other aspect of what it does is it provides
10 a new set of skills and requirements of mediators to be
11 able to navigate the technology, be able to read into
12 the clues and emotions that go into text, and give them
13 the ability actually to leverage our mentor network to
14 help them work closer towards a resolution. And we
15 have a whole bunch of tools that we continually, daily
16 basis actually give them tools to actually help
17 facilitate the process along for different types of
18 situations.

19 So, at this point then it goes into a back and
20 forth between the mediator and each of the sellers --
21 each of the parties. At this point, it's a completely
22 confidential process between mediator and each of the
23 parties. So, the mediator has a choice to say what
24 will go to one party, what will go to both parties, and
25 really what the mediator is doing is facilitating and

1 syndicating a resolution.

2 Once the resolution is syndicated, it's posted.
3 This is something of an ugly screen, but it's basically
4 the resolution that both parties have agreed to, and it
5 gives both parties the opportunity to accept or reject
6 the resolution. And what we've learned in our
7 experience with ebay is people want resolution,
8 regardless of where they are in a case, and so while we
9 would like to actually have both parties achieve
10 resolution, some parties actually like to have a
11 proposed settlement. So, even though you don't
12 necessarily always have both parties agreeing to the
13 resolution, it's actually a much better user experience
14 from the user side.

15 And then the last slide here gives you the
16 perspective from the mediator of what the solution was.
17 So, in this case, what happened was there was a \$150
18 cleaning cost, and this is actually really what
19 happened, and the seller agreed to actually contribute
20 \$100 to actually help clean it.

21 So, this is actually a real case, slightly
22 abstracted, which points out that a different form of
23 resolution is required. This is not a simple credit
24 card charge-back -- I'm sorry, Hank -- but this is
25 something that actually requires a much more

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1 sophisticated means of getting parties to work
2 together. A lot of this is about communication. A lot
3 of this, while it may actually resolve and boil down to
4 a money settlement, it required this communication and
5 identification of the issues being heard, and both the
6 technology of communicating as well as working with the
7 mediator who facilitates that.

8 And at this point, I'd just like to draw on a
9 few of the lessons we've learned. First of all, as I
10 said, dispute resolution -- online dispute resolution
11 has worked, and it's valuable. The majority of
12 respondents to cases filed are actually coming to the
13 table. Of the cases where both parties come to the
14 table, a vast majority are actually reaching
15 settlement, and we have had zero cases of parties
16 backing out of settlement.

17 Even more powerful to me and I think for the
18 online marketplace managers of the world is that
19 participation in the SquareTrade process is greatly
20 building confidence. It's building confidence in the
21 marketplace and willingness to transact again, which is
22 really in many ways the importance of the solution from
23 their perspective. Providing this consumer protection
24 increases liquidity and confidence of trading in their
25 market.

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1 So, then I actually circled back to the point
2 of actually how are we so successful in actually
3 getting these resolutions, and I think it comes down in
4 many ways to the power of our initial partnership with
5 ebay and their metric of performance, called user
6 feedback. We find this to be an essential tool and a
7 means to participate in a process, and this brings us
8 back to our fundamental goal of enabling e-commerce.
9 The value is not just in resolving disputes but in
10 creating a framework in which buyers and seller with no
11 prior relationship can transact in confidence.

12 And this brings us really to the second aspect
13 of the SquareTrade solution, which is really just
14 launched, which is the SquareTrade Seal. And the seal
15 does really the same effect of displaying key things
16 that buyers care about to build trust with an unknown
17 seller. It has to do with knowledge of who they're
18 dealing with, has to do with knowledge that the seller
19 is committed to this framework of fair practice and has
20 knowledge of prior performance and track records, which
21 will be building over time.

22 All of these are important mechanisms to
23 facilitating trust prior to transactions, not just
24 after transactions, and when -- or after disputes, and
25 when dispute arises with this metric, it becomes a

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1 powerful market base enforcement mechanism to get
2 successful resolution.

3 The way that SquareTrade is deploying this seal
4 is also relatively interesting. We have deployed a
5 sophisticated technology to control seal usage, where
6 we dynamically surf seals on seller webpages,
7 individual sellers, on individual item listings where
8 they choose to post them, from our secure publication
9 facility in San Francisco. This enables buyers to
10 click through and identify seller seals with confidence
11 that this wasn't artificially placed on the site. It
12 also enables us at SquareTrade to revoke and suspend
13 the usage at any time to really maintain the power of
14 what the seal stands for.

15 So, in closing, we are learning daily through
16 our work with the internet's leading marketplaces, ODR
17 is -- it works, and it's needed. Its presence builds
18 user confidence, and the SquareTrade Seal is extending
19 the needed trust prior to transactions to further
20 enable our main goal of enabling online commerce.

21 Thanks very much, and actually want to invite
22 you all, if you haven't seen already, to a little
23 reception we're having after tonight's events to
24 hopefully carry on the discussion of everything today.

25 Thank you.

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1 (Applause.)

2 MS. WELLBERRY: Thank you, Steve.

3 Next we'll have Jim Burchetta of CyberSettle,
4 and there will be time for questions I think when all
5 the presenters are done, so if you could just hold your
6 questions for a while.

7 MR. BURCHETTA: Good morning. My name is James
8 Burchetta, and I'm the -- a little lower? Okay, I'm
9 told to wait.

10 Thank you. My name is James Burchetta, and I'm
11 the chairman, co-founder and co-CEO of CyberSettle.com.
12 We're the first online dispute resolution company. We
13 were founded in 1996. We were in development for
14 almost two years and actually took our first claim in
15 in August of 1998. We have been in continuous
16 operation from that date to the present time.

17 We elected as our first product to use our
18 double-blind bid method of settlement to settle
19 insurance claims between consumers and insurance
20 companies and insurance companies with or without
21 lawyers. We are now settling claims in every state in
22 the United States and throughout Canada. We've opened
23 an office in the UK and will start taking our first
24 claim in in Europe at the end of this month.

25 We have grown from about six employees a year

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1 ago to over 150 today. So, I guess we're growing you
2 would say at the speed of the internet, but more
3 importantly, we've proven to ourself and we've proven
4 to the world that you can use the internet to resolve
5 disputes. We have over 16,000 claims that have come in
6 through our system. We have over 10,000 claim
7 representatives from the major insurance companies
8 using our system and settling claims in every state and
9 throughout Canada. So, we're very excited about the
10 future of the internet and the future of CyberSettle.

11 I don't normally do this, but I think it's
12 important to let you know a little bit about my
13 background, and it will help understand why CyberSettle
14 was founded and give you a little insight into what we
15 think our mission and our goal is as a company in the
16 internet world.

17 I'm a trial lawyer by profession. I spent 25
18 years trying cases, representing only individuals in
19 mostly personal injury and product liability and
20 medical malpractice cases. I was also a mediator and
21 an arbitrator in the personal injury and in the medical
22 malpractice field. So, I know too well the frustration
23 of a claimant waiting three years or five years to have
24 their controversy resolved in a courtroom or the
25 frustration of an individual whose husband injured

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1 through the fault of someone else has lost his job or a
2 house that is about to be foreclosed because the
3 judicial system is too slow to respond to a legitimate
4 controversy. So, as a trial lawyer, I became
5 personally more and more frustrated with the process.

6 We called it negotiating; it was really nothing
7 more than posturing. I mean, if I wanted \$100,000 on
8 behalf of my client, I would demand \$250,000. If you
9 wanted to pay \$80,000, you would offer \$40,000. So,
10 the spread, \$40,000/\$250,000, were miles apart. Here's
11 a jury slip, go pick a jury; or here's a jury date for
12 a case in March of 2002. That happens today in
13 courtrooms throughout the world, not only in the United
14 States.

15 So, I toyed with the idea of isn't there a
16 better way of resolving disputes, and what I did in a
17 courtroom with lawyers that I knew was I tried to
18 engage them in what I considered to be a novel process.
19 Write down on a piece of paper what you're really
20 willing to pay, and I'll write down on a piece of paper
21 what I'm really willing to take, and we'll take those
22 numbers, won't look at them, we'll fold them in two,
23 we'll give them to the court clerk, and if we're within
24 a certain range, we'll agree to split the difference.

25 Well, I did that, and I started settling cases.

1 And I actually did it with Charlie Brockman, who is now
2 co-founder and co-CEO of CyberSettle, who was a defense
3 lawyer, and we settled a case using this double-blind
4 bid process.

5 The internet started to grow, and we realized
6 that with the internet there was now a vehicle to do
7 what we did with two slips of paper on a much larger
8 scale and to try to bring some economy of scale and
9 time into a system which is described by most people in
10 it as an industry or two industries in crisis. It
11 costs too much time and it takes too long to resolve a
12 garden variety, everyday controversy.

13 So, to the dismay of my law partners and my
14 family and friends, I left the practice of law and went
15 into development almost three and a half, four years
16 ago in an industry that was still in formation. I
17 mean, we started developing the CyberSettle website
18 before PriceLine was a company, for example. So, we
19 were experimenting with this, and we have proven to
20 ourself and to the world that you can use the internet
21 to try to settle claims.

22 If you look philosophically at the mission or
23 the goal of conflict resolution and you look back in
24 history, you will know that a society is judged by its
25 ability to settle its disputes in a timely and a

1 cost-effective manner. And I think there is a crisis
2 in the U.S. and around the world, and a lot of
3 societies are failing in that goal.

4 When you look at the internet as this new
5 global community, the internet fails in providing a
6 mechanism to resolve disputes, and I think the
7 challenge we all have in this room and that the FTC
8 feels and the European Union feels and that we at
9 CyberSettle feel is what is the mechanism that's going
10 to be put in place to allow consumers -- and I define
11 consumers as anyone who uses the internet, whether it's
12 a business or a consumer, someone using the internet to
13 buy or sell or perform some kind of transaction -- but
14 what is the mechanism that's going to be in place to
15 allow consumers to inexpensively and efficiently
16 resolve their disputes?

17 I mean, how can someone who lives in Korea, who
18 buys a product from someone in Germany using a platform
19 or a company in the U.S., how can that person hire an
20 international lawyer in Washington, D.C. to retain a
21 lawyer in Munich and another one in Korea to resolve a
22 dispute, especially when many of these disputes are of
23 an economic value that do not warrant retaining a
24 lawyer in the first instance?

25 So, I applaud the FTC on what it's done in the

1 privacy area and the Department of Commerce in what
2 it's doing in online dispute resolution, because for
3 the internet to really grow, to really, truly fulfill
4 its promise of being this new paradigm, we have to
5 solve the privacy issues which are still out there, and
6 we have to solve the online dispute resolution issues
7 which we are addressing over these next two days.

8 Consistent with that, we have been settling
9 insurance claims, and if you look at the insurance
10 industry, I mean this is a global financial
11 institution, trillion dollar industry. They have
12 built- in costs and inefficiencies which affect
13 consumers in the price of auto insurance and
14 homeowners' insurance, and we have been described as
15 the only new idea to come along in a hundred years in
16 dispute resolution in the insurance industry; that
17 CyberSettle is to claims administration what the
18 printing press was to publishing; that arbitration and
19 mediation was an evolution, and the CyberSettle method
20 is a revolution.

21 What's revolutionary about it is that we
22 designed a system, we call it the double-blind bid
23 process. We have received notice of allowance from the
24 U.S. Patent Office that all of our claims for this
25 method-of-doing-business patent have been granted. We

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1 have paid our registration fee, and we expect the
2 patent to issue shortly.

3 But at the heart of it, it allows sides for the
4 first time to use the internet to communicate offers
5 and demands nonverbally on a secure website. It is a
6 process which is totally secure. It's an encrypted
7 process. We can't see the offers or the demands. When
8 I say "we," I mean anyone from CyberSettle. The offers
9 and the demands are not -- the numerical amounts are
10 not communicated to the other side. It's a totally
11 blind process.

12 So, for example, on an insurance claim, an
13 insurance company can upload into our system three
14 settlement offers in the blind. We then electronically
15 notify the other side, the lawyer or the claimant, that
16 XYZ Insurance Company wants to settle this dispute and
17 has put three good faith offers into the CyberSettle
18 system.

19 We then explain and afford the other side the
20 opportunity to come into the system, to put in three
21 demands round by round. If in any round the demand is
22 within a percentage, typically in the insurance area 30
23 percent or \$5,000, it's the trigger to split the
24 difference between the two numbers. The uniqueness of
25 it is if the case does not settle, neither side is at a

1 disadvantage.

2 In my example before, if the case didn't settle
3 for the hundred thousand I wanted, I could get up
4 tomorrow morning or this afternoon and go to court and
5 demand \$250,000, and the insurance company could say no
6 pay or offer \$40,000, but what we have done is given
7 both sides the opportunity of coming together, this
8 concept of negotiating, which is really posturing, to
9 allow you them the first time to communicate offers
10 that can only settle the controversy at a figure that
11 they can calculate and agree to, and if it doesn't
12 settle, the numbers cannot be used to hurt them.

13 We actually presented CyberSettle to the
14 Harvard Business School, a group on an advanced ADR
15 program, and they talked about and they were intrigued
16 about what they referred to as the ZOPA, the zone of
17 possible agreement, which the mission of arbitration
18 and mediation is to bring parties together to clearly
19 identify this area where an agreement or a settlement
20 could be obtained.

21 We actually create this electronic ZOPA where
22 we allow the parties to see whether they are within a
23 range, and if they're within that range, we allow them
24 to agree to split the difference between the two
25 numbers.

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1 So, what I thought we would do now is actually
2 settle a case for you. I have Richard Schmall, who's
3 our senior VP of business development and technology,
4 who was the COO of Jacoby Myers nationwide before
5 joining CyberSettle, so he is knowledgeable in the
6 consumer personal injury field. But this is actually
7 -- we are not live on the internet, because we don't
8 have internet access, but this is essentially our site.
9 It's a very simple site to use. If you can put three
10 numbers in the system, you can use CyberSettle.

11 And we know because we have a customer support
12 center where if you have a problem, you can call and
13 speak to them, and our own statistics show that once
14 you use the system once, you never come back to ask
15 again or to seek more information, that it's kind of an
16 intuitive system to use.

17 So, Richard is now a claim representative for
18 an insurance company someplace in the U.S. He's got to
19 work today and decided he wanted to settle a claim.
20 This is a pending case that he has in his office, and
21 he probably has communicated or certainly has
22 communicated with the other side on a number of
23 occasions, because what CyberSettle is not is we are
24 not artificial intelligence. We do not determine the
25 value of the case. We don't do the job of either

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1 party. They analyze the liability, the risk, the
2 damages, the injuries. We are only a place in
3 cyberspace where you can go for the first time to
4 communicate these offers nonverbally.

5 So, Richard knows the case, knows the
6 liability, knows the injuries, knows the litigant on
7 the other side and now wants to try to settle the case.
8 So, using a password that's been provided to him, he
9 enters the system.

10 There's a participation agreement where he
11 agrees to be bound by the outcome of the settlement
12 reached in our system, and, you know, it states that he
13 has actual authority on behalf of the company to enter
14 into this agreement. So, he would agree to the
15 participation agreement.

16 Then there's a number of things he can do. He
17 can review other cases that he has in the system.
18 There are a lot of administrative things he can do, but
19 today he's going to decide to settle a case against an
20 unrepresented plaintiff. This is someone in America,
21 the proverbial housewife from Idaho on AOL that has an
22 insurance claim who's been trying to settle it with an
23 insurance company.

24 So, let's say it's a bodily injury claim that
25 she wishes to settle -- that they wish to settle, and

1 he is now going to put in the case information. Now,
2 we do have the ability -- and I'll let him do that, you
3 know, claim number, the date of loss, the plaintiff's
4 name, the defense name. We do have the ability to data
5 mine that information. We can actually extract from
6 legacy systems of our clients all of that claim
7 information, so for a user, it would simply be putting
8 in the offers, but we're filling it out at this time.

9 So, Mary Smith was the plaintiff, the defendant
10 is Thomas Defendant, and if there are additional
11 defendants, he could add it there, that this settlement
12 would be on behalf of other people, so if it was a
13 driver/operator, could be on behalf of GMAC, the
14 leasing company that owns the car or the corporation
15 that owns it.

16 Continuing now, and this is now the claimant's
17 information. This is Mary Smith, the defendant. He
18 puts her address in, other information, and will now --
19 will have the opportunity to actually submit offers on
20 this case, and when the offers are submitted, as I
21 mentioned before, they're automatically transferred to
22 -- they hit our servers and actually go to our
23 fulfillment center where an auto e-mail, auto fax and
24 hard copy letter is sent to Mary Smith explaining to
25 her that she has the right to come in to try to settle

1 her claim.

2 Now, these are the offers. It explains that
3 the formula being used is 30 percent or \$5,000. So,
4 Richard's going to put his offers in, and let's say,
5 you know, he'd love to settle this case for \$5,000, so
6 that's going to be his first offer. He'll pay \$7,000,
7 and ultimately he will go to \$8,000 if he has to.

8 Now, because we create -- because there's a
9 formula, there is actually a range of settlement, the
10 ZOPA, as I referred to, being established. So, by
11 putting an offer of \$8,000, he may have to pay \$10,500,
12 a percentage more. If he didn't want to pay that much,
13 he would scale the offer back down.

14 He can also decide what period of time he wants
15 the offer open for, up to 45 days, he could select 30
16 days, so that the other side has to put their demands
17 in within that period of time.

18 So, now we are going to -- there is other
19 information, if a lawsuit was filed, the trial was
20 imminent, we would handle that claim specially. If the
21 trial was on next Tuesday, that would get a personal
22 call to the other side or a personal request to submit
23 demands.

24 So, this claim is now -- this is a case summary
25 review that he's looking at. It has all the vital

1 information, the settlement formula, the three offers,
2 the date that it expires, all of the other information
3 which he can choose, and he's agreeing -- the
4 plaintiff's information, that's the claimant, Mary
5 Smith, and now he's going to submit this claim.

6 He receives a "claim successfully submitted."
7 Again, instantly, that has sent out an e-mail and a fax
8 and a hard copy letter to Mary Smith. He can download
9 that, print it out, put it in his file.

10 So, now, let's make believe that Mary Smith got
11 the communique, got the e-mail, very excited, because
12 she's been trying to settle the case for the last year
13 or two years. She is given a passcode and a
14 password -- Richard's going in just actually to
15 identify that now -- and will be given the opportunity
16 to settle the claim.

17 She can put a demand in. Each demand is
18 compared -- the first round demand is compared against
19 the first round offer, and after the first round
20 demand, if it does not settle, she can go offline,
21 speak to her husband, you know, look at her file,
22 decide what to do. If you're a lawyer, you can do more
23 research, whatever. You have that 45-day period of
24 time in which to submit a claim. So, the three rounds
25 do not have to be played all at one time.

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1 Okay, so, now, she reviews this information.

2 She --

3 MR. SCHMALL: I have to log back in.

4 MR. BURCHETTA: Okay.

5 She has the opportunity to review the
6 information, to say this is actually my case, I am the
7 litigant in this case. She obviously does not see the
8 demand -- the offers that were made, but she has the
9 opportunity to make the demands against those offers.

10 There's a participation agreement that she
11 signs. She agrees to be bound by the outcome. If
12 you're a lawyer, the lawyer is agreeing that he or she
13 has actual or apparent authority on behalf of the
14 client. This is a -- this is for statistical -- this
15 is for future purposes. It's a password verification.
16 So, we are going to go in now.

17 She wants to submit a demand on a case. She
18 can review other cases if she had one. So, she's going
19 to put her case ID number that was supplied to her.

20 She will now see the case summary, verify that
21 this is her case. She sees the formula. She knows she
22 has until July 7th at 12:01 a.m. to submit the claims.
23 She knows that Richard Schmall is the insurance company
24 representative from Fair Insurance Company. Now she is
25 going to enter a demand.

1 She is looking -- she would love to settle this
2 case for \$20,000. She is going to make a demand of
3 \$20,000. It will create her range. By doing that, she
4 is willing to take \$17,000. So, she agrees to submit
5 that demand. Now, obviously that demand is being
6 looked -- compared to the \$5,000 offer that was made by
7 the insurance company. It's not within formula, and it
8 will not result in a settlement.

9 Instantly, in realtime online, unlike ebay,
10 PriceLine, the auction, this makes the comparison in
11 realtime and reports it instantly to her. She knows
12 that that demand for this case does not settle it. She
13 does not know the offer. She does not know how far
14 apart she is. She just knows the case didn't settle.
15 So, she can go to round two immediately or go offline
16 and come back on.

17 Let's go to the second round, and she is going
18 to go down to \$15,000. She has gotten more reasonable,
19 and she would love to settle the case for this. It's
20 not her bottom line number, but she is trying to see if
21 she can settle. She submits it. Again, I'm sorry,
22 your case did not settle. It's not within formula.

23 She decides that she really wants to settle
24 this case, goes in and puts a third round demand in of
25 \$10,000. That \$10,000 is compared to the \$8,000 offer

1 that was in the system, and it's within formula. And
2 you will see congratulations, your case settled for
3 \$9,000. It was a trigger to split the difference
4 between the demand and the offer, the \$8,000 and
5 \$10,000.

6 We also have the ability to generate online the
7 insurance company's state-specific closing documents.
8 So, if this were a housewife from Idaho and it was
9 State Farm Insurance, we would have State Farm's
10 general release for Idaho. It would be filled out, and
11 it would allow her to execute it online, and as a lot
12 of the federal laws change and allow for electronic
13 signature, 11 states have adopted it already, but as
14 those change and as -- we actually have the ability not
15 only to settle the case, but we could have sent the
16 claimant in an introductory package a co-branded smart
17 card, a CyberSettle, and in the case of Travelers
18 Insurance, it could be Travelers', you know, CitiCorp
19 card.

20 So, not only can we settle the case, we can
21 allow the claimant to sign the documents online, and in
22 a nanosecond, send her \$9,000 to her, either smart card
23 technology, which would allow her to deposit her money
24 in a bank, it might open a trading account if she
25 wanted to buy stocks or bonds or do anything else, a

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1 host of other things. So, we have the ability not only
2 to help settle claims but to speed up the process of
3 settling.

4 Thank you. And I can tell you that, as I said,
5 that we've settled -- we have had over 16,000 claims in
6 our system from the time that we've initiated in August
7 of 1998 until the present time, and we continue to work
8 closely, you know, with our clients and with the trial
9 bar to bring out enhancements to this product.
10 Claimants and lawyers and claimants without lawyers can
11 enter this system to initiate the process, to make
12 demands, to put in offers, to make demands against
13 insurance companies or against other individuals.

14 I mean, this can be used as a virtual court
15 system between claimants and parties to resolve their
16 disputes when money is at issue. We have been over the
17 last year been meeting with a number of internet
18 companies, both in the business-to-business space and
19 in the business-to-consumer space, who have been
20 intrigued about this double-blind bid process of
21 resolving disputes, and these parties know that even
22 when there are other issues which have to be resolved,
23 ultimately, in a large number of cases, and we've seen
24 reports that it's greater than 70 percent, that at some
25 point in time, it's money which is at issue that will

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1 resolve the controversy.

2 And this double-blinded system of allowing
3 parties for the first time to see if they can bridge
4 the gap in a very efficient way using the internet in a
5 way that could never come back to hurt them is at the
6 heart of what CyberSettle does.

7 We have, however, for the past year been in
8 business development with an online mediation,
9 facilitation and arbitration system, similar to
10 SquareTrade's. It's different in that at every stage
11 of that process, we would allow the litigants to use
12 our double-blind bid process when money could resolve
13 the issues. So, for example, in the SquareTrade
14 example you saw, if that claimant or purchaser wanted
15 her money back instead of the chair cleaned, there
16 could be -- our system could be used to make a demand
17 and an offer on that system.

18 So, we have announced and we are launching
19 using CyberSettle's Trust Mark as the first and leading
20 online dispute resolution company, a program or a
21 system to resolve disputes using online mediation and
22 arbitration, and we expect to go live with that on July
23 15th, at which time we will also announce affiliations
24 with one or more major internet companies who will use
25 our platform to resolve disputes.

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1 And we then intend to announce almost on a
2 weekly basis alliances with other businesses and
3 companies who will use our platform to settle disputes,
4 as well. And the purpose obviously is to provide the
5 mechanism or the vehicle by which disputes for people
6 who use the internet and otherwise can be handled on a
7 cost-effective and expeditious manner.

8 We have annunciated our own standards. I mean,
9 these are our internal CyberSettle standards, and it's
10 an anachronism of DISPUTE, D I S P U T E, and these are
11 the principles or the guidelines that we are going to
12 hold our company to that we think are necessary in the
13 industry to actually fulfill the promise of being able
14 to resolve disputes globally for people and companies
15 who use the internet.

16 I mean, disclosure, it's common sense. I spoke
17 yesterday in New York at a seminar on Privacy and the
18 Bottom Line, and I heard two people asking or
19 suggesting that it was a stupid topic for a seminar,
20 you know, what does privacy have to do with the bottom
21 line? It has everything to do with it. A business
22 relationship is like a friendship or a love
23 relationship. It's based on trust. If there's no
24 trust between the consumers and what you do, you do not
25 have a business, you do not have a bottom line. So,

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1 the privacy issues which everyone is grappling with
2 have to be dealt with. Privacy is most important.

3 As it relates to online dispute resolution,
4 it's disclosure of what we do, of how the system works.
5 If they use the site to transact business, there is a
6 mechanism now in place where if they don't get the
7 product or the product is damaged or musty or soiled or
8 whatever, there is a place to go where you can now
9 resolve that dispute. So, disclosure is at the heart
10 of what every company should do, especially in the
11 internet space.

12 And unless disclosure and privacy is dealt
13 with, you are going to find people running away from
14 their computers instead of to them for commerce
15 purposes, and we all know the statistics. There is
16 still more Americans and more people in this world who
17 are frightened about using the internet than who want
18 to use it, and disclosure, failing to have a dispute
19 mechanism in place, and privacy are their biggest
20 concerns.

21 The second standard is it has to be
22 inexpensive. I mean, for these small value
23 transactions, consumers can't afford tremendous costs
24 to resolve those disputes. In many cases, as it
25 relates to the consumer, for small value items, the

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1 cost should be nothing. It should be a cost absorbed
2 by someone, by the industry, by the industry group for
3 small consumer disputes.

4 The system must be simple to use. I mean, if
5 it's cumbersome, you are not going to get trust, you
6 are not going to get usage, you are not going to get
7 acceptance in the marketplace.

8 The privacy issue I already mentioned, I mean,
9 every company must have a stated privacy policy. It
10 must be on their site. They must start adhering to the
11 standards, both national and international, that have
12 been discussed and promulgated if they are going to
13 survive in the internet marketplace.

14 It has to be universal. We have to be able to
15 handle trans-boundary, trans-global disputes. The
16 example I gave before of someone in Korea buying goods
17 from someone in Germany or in Europe, you know, using a
18 system from another country, there is no recourse right
19 now. So, it's important that that issue be addressed.

20 Enforceability, I mean, whether it's going to
21 be charge-backs on credit cards, which is something we
22 are looking into and we're working with our partnership
23 companies as a way of having an enforceable tool;
24 whether groups of industries get together and do an
25 escrow pool of money to stand behind a settlement;

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1 whether the insurance industry steps forward to insure
2 a product, which insures the transaction on the
3 internet. There are groups dealing and we are
4 discussing all of those issues with various entities as
5 a way of providing some measure of trust and
6 enforceability to the settlements which are reached
7 online.

8 The one thing I can tell you is that we at
9 CyberSettle, we're committed to make this work. We are
10 committed to make sure that it's simple to use, that
11 it's cost-effective, that it makes common sense, that
12 it's accepted by the marketplace and that it's in the
13 best interests of the consumers.

14 We look forward in working with all of you and
15 the FTC, and we welcome your participation and your
16 driving force in this industry to make it better.

17 Thank you.

18 (Applause.)

19 MS. WELLBERRY: Thank you, Jim.

20 Now we'll have Clyde Long of iCourthouse to
21 explain their system. We are going to have to take
22 another couple of minutes again to shift the computer,
23 so bear with us, please.

24 MR. LONG: Good morning, everyone. My name is
25 Clyde Long. I'm the CEO and founder of iCourthouse.

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1 We are having some technical issues here, but I would
2 like to get started with my talk and describe for you
3 what iCourthouse does.

4 Just as an aside, I've been hearing some
5 fascinating approaches to the technology of using the
6 internet to solve disputes, and I think iCourthouse
7 makes a very interesting addition to CyberSettle and
8 SquareTrade.

9 To tell you a little bit about iCourthouse, I
10 founded the company almost exactly a year ago, in fact,
11 a few days ago it was the first birthday of
12 iCourthouse, and iCourthouse came from my thoughts and
13 vision of the internet needing a courthouse, just as
14 the internet now has car dealerships, banks and the
15 other structure that you would associate with a real
16 society, the internet also needed a courthouse.

17 And what I -- my goal was to use some of the
18 unique features of the internet to try cases online or
19 to be able to litigate online. And the way iCourthouse
20 does that is presenting -- is to present jury trials
21 using internet jurors who are members of iCourthouse.

22 My background, I've been a trial lawyer for 20
23 years. I've done a lot of arbitration, mediation, I've
24 served as a judge pro temps, and what I wanted to do
25 was incorporate some of the best features of all of

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1 that into the iCourthouse site.

2 iCourthouse is not limited to online disputes,
3 such as SquareTrade and CyberSettle. We can both
4 handle disputes that occur online, such as auction
5 disputes, as well as offline disputes. The kind of
6 cases that have been filed at iCourthouse to date
7 involve neighbor disputes, online disputes, really
8 anything that you'd see in small claims courthouse or
9 regular courthouse. So, in that sense, the term that's
10 been used lately, "ODR," online dispute resolution,
11 really there's two aspects of that as it relates to
12 iCourthouse. iCourthouse can resolve online disputes,
13 but it's also a form of online dispute resolution for
14 cases that might be pending at a courthouse.

15 Now, like a courthouse, a traditional
16 courthouse, at iCourthouse, claims can be filed by
17 parties, the system summons defendants to the site,
18 arguments and evidence can be presented, jurors can
19 register for jury duty at iCourthouse. It's a process
20 that takes several minutes. It can be done at 3:00 in
21 the morning in your robe, and so one thing iCourthouse
22 does is respects jurors and also uses the internet to
23 make the system very easy to use for the jurors.

24 And again, unlike some of the other dispute
25 resolution programs that you're going to be -- you have

1 heard about and are going to hear about over the next
2 day or two, iCourthouse does a render a decision, and
3 there is a singular aspect to the decision being
4 rendered. In terms of dispute resolution, it's a
5 reality check. It's a way for people to find out from
6 internet jurors, from the online community what the
7 merits of the case may be, and in the hands of a
8 mediator or arbitrator, of course, that's a very
9 valuable lesson or valuable piece of information.

10 Unlike a traditional courthouse, though,
11 iCourthouse doesn't have geographical limitations.
12 There are no jurisdictional boundaries to deal with,
13 and iCourthouse can be truly international in scope.
14 So, it's a new forum for the entire online world
15 internationally.

16 iCourthouse is efficient. It can take as
17 little as a day or two to have your case fully
18 adjudicated by a jury of your online peers. It's
19 inexpensive. There are two forms of iCourthouse
20 available. The kind that you can see at the site, at
21 the website, is free, and we call those cases peer
22 cases, because what you end up doing is you have a jury
23 of your peers deciding your case, your online peers.

24 There's a form of iCourthouse that's not
25 visible at the site called panel cases, and what panel

1 cases do is allow parties to select jurors, question
2 jurors, much as an attorney would select jurors and ask
3 them questions in order to pick a specified panel of
4 jurors to decide a case.

5 Now, since the site launched in November 1999,
6 the site has had over 4 million hits. There's been
7 over 200 cases filed, some of which have been decided.
8 We now have a jury pool of 3000 jurors. And from
9 analyzing the traffic at the site, we're getting about
10 85 percent of the visits from the United States, 10 to
11 15 percent internationally. We have had visits from --
12 participants from the UK, from Australia, also from
13 other non-English-speaking countries, such as South
14 America, Israel. We had some visits from Croatia,
15 France and Canada. So, this iCourthouse seems to have
16 been able to surmount the issue of language
17 difficulties of a site. Cases could conceivably be put
18 on in any language, but the cases I've seen have been
19 put on in English.

20 Now, there's several uses to iCourthouse,
21 keeping in mind that it's both a solution for online
22 disputes and disputes that might be in court. The
23 simplest form of iCourthouse allows you to actually
24 litigate with an opponent. There can be a contract
25 where the parties would agree to be contractually bound

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1 by the result, or it can be like a nonbinding
2 arbitration, where again, the system -- the jurors look
3 at both sides of a dispute, the evidence that's been
4 presented, and then decide who is right and who is
5 wrong, what has worked and what hasn't, and that can
6 lay a basis for future face-to-face mediation or other
7 settlement efforts.

8 The other way to use iCourthouse is to evaluate
9 your case. If you're a party with a dispute with
10 someone or an attorney, you can put on through the
11 iCourthouse system both sides of a case or just your
12 side of a case for evaluation. Therefore, iCourthouse
13 allows you to test your evidence and arguments.

14 The free version of iCourthouse, the peer
15 cases, because they don't cost anything, allow parties
16 to put on cases different ways, using different pieces
17 of evidence, different arguments, using different forms
18 of witness testimony in order to evaluate what might
19 best work before a real set of jurors.

20 In its fully developed form, the panel jury
21 case, attorneys can put on full-fledged mock trial,
22 much akin to a mock trial or a focus group where you
23 would go and hire the participants, but at iCourthouse,
24 for \$100 to \$200, you get to do that, instead of
25 \$20,000 for a mock trial. So, it's bringing technology

1 to the small case, to the party that doesn't have a lot
2 of money to spend, and this powerful technology of case
3 evaluation now is not just limited to a large company,
4 a well-heeled litigant or limited to enormous cases.
5 Any case can benefit from evaluation and frank
6 evaluation, seeing both sides and what works. It isn't
7 just an evaluation of what side works but what works in
8 the process.

9 One aspect of iCourthouse that we're very
10 excited about, and this probably augers well down the
11 road for the dispute resolution community, is
12 iCourthouse can be used as a powerful training tool for
13 law students or even students in college or at the high
14 school level in dispute resolution. We've spoken with
15 a number of members of the academic community about
16 this, and we're real excited about pursuing that
17 manifestation of iCourthouse.

18 And finally, iCourthouse can be used as an
19 adjunct to face-to-face mediation. The co-founder of
20 iCourthouse is an experienced mediator, and she
21 believes that the feedback that you get from
22 iCourthouse acts as a very, very powerful reality
23 check, especially for parties that are absolutely
24 convinced that they're right and are not open to
25 hearing the other side of a case. This is a way that a

1 mediator can be empowered with an additional tool to
2 assist parties in coming together and achieving
3 settlement, whether that be a face-to-face mediation or
4 an online mediation.

5 And finally, the other application for
6 iCourthouse really is an adjunct to the court system,
7 whether it be the federal courts, the state courts or
8 administrative bodies. My experience with the courts
9 in California is they are all looking for new tools to
10 encourage people to settle cases.

11 I was interested in Professor Izumi's comments
12 about California and cases taking six years. That used
13 to be the case a few years ago. California's been a
14 leader in various forms of case evaluation and case
15 settlement, and now I think the average time from case
16 filing to resolution of the case is somewhere in the
17 range of 12 to 18 months in many jurisdictions.

18 But what iCourthouse does is give the courts
19 yet another tool. It's not mutually exclusive with
20 mediation, binding arbitration or nonbinding
21 arbitration.

22 Now, thanks to the efforts of the technical
23 folks here, I'm able to show you at least a brief tour
24 of how the iCourthouse works. This is the homepage of
25 iCourthouse, and as you can see, there is three basic

1 choices that you can make when you go to the site,
2 which, by the way, is www.iCourthouse.com. You can
3 file a claim, you can be a juror, or you can view
4 cases. At view cases, you see the entire case court
5 docket of iCourthouse.

6 One of the goals we have had as a
7 consumer-oriented application is to make this fun and
8 interesting, and judging from the interest in the court
9 TV shows, whether they be Judge Judy or People's Court
10 and the other real-life court shows, there's a lot of
11 interest in participating and understanding our legal
12 system, and what iCourthouse does, what it delivers for
13 the jurors is a way for jurors to in a very fun, easy
14 way participate in resolving disputes.

15 So, the first step if you were to -- let's say
16 you were a plaintiff and you had a case to file, the
17 first options that are given to you are do you want to
18 do a peer jury, which is the free consumer-oriented
19 jury trial, or a panel jury, which is more for
20 attorneys? Most of our visitors elect to do a peer
21 jury, because it is -- it doesn't cost anything.

22 And there's three choices a plaintiff can make
23 here depending on what the plaintiff would like to do.
24 The plaintiff can fill out a claim form and a trial
25 book, summons the defendant to iCourthouse. An e-mail

1 goes out to the defendant with a live link to
2 registration, so the defendant can also register.
3 That's one possibility.

4 But a plaintiff may also just want to put on
5 his or her side of the case to get some feedback from
6 the online community. The third choice that's
7 available is to fill out a trial book and put on both
8 sides of a case. As I'm still practicing law a little
9 bit in addition to operating iCourthouse, and I've put
10 some of my cases on, and I was gratified to see that my
11 view of the case was ratified by the jury, but if you
12 think about it, had I learned the opposite, that may
13 have even been a more valuable lesson to have learned.
14 So, there's three choices and three ways that you can
15 go with the filing of the claim.

16 The claim form itself is very easy to use. It
17 was modeled on the small claims court forms that we
18 have in California and probably elsewhere. There's
19 menus for who you are, whether you're an individual, a
20 couple or a business, who is the defendant, an
21 individual, couple or business. You type in the
22 defendant's name, e-mail address, and you can see
23 you're given the option to add defendants if you want.
24 Then you're asked to state what kind of claim you have.

25 Now, I don't have these menus active in this

1 presentation, but there's a list of about 20 different
2 kinds of cases that you can file, one of them being
3 other, so you are not limited to just our menu.

4 Then finally you get to put in a brief summary
5 of the case, 100 words are or less. That's an abstract
6 of the case that really takes the -- takes the role of
7 the pleadings. What happens with that abstract is it
8 goes to our docket for everyone to see. That's where
9 the jurors can decide whether or not they would like to
10 participate in that particular case that you filed.

11 Now, once the claim is filed, the litigants or
12 the plaintiff, they're given what we call a trial book,
13 and that's arranged just like the trial books that many
14 attorneys use in court, where there's an opening
15 statement area, there's an evidence tab that you click
16 on and you open up all your evidence. You can put in
17 typed-in evidence or you can upload any kind of digital
18 file at all, whether it be an image, a gift file, a
19 JPEG photograph, any kind of scanned image, any kind of
20 Word document that an attorney or you might otherwise
21 have in your computer can be used as evidence in the
22 trial books at iCourthouse.

23 I've put in a case that was filed by an
24 attorney just so that you can see sort of a
25 well-developed opening statement. This is a case

1 involving a bicycle versus a truck on a rural road.
2 So, what the plaintiff did was state what he was going
3 to show, what the damages are and what he would like to
4 be awarded.

5 The next thing you do is go to the evidence
6 tab, and what our system does is automatically numbers
7 plaintiff's exhibits 1, 2, 3, 4, defendant's exhibits
8 A, B, C, D, again like a presentation in a court, and
9 as exhibits are created, they're added to your evidence
10 list with live links to each exhibit.

11 One thing that you can see that we added based
12 on responding to feedback we were getting from our
13 users is there's a live link to the defendant's
14 evidence. So, for example, if you're comparing two
15 declarations, with the simple click of a mouse, you can
16 go back and forth and see the evidence, the statements
17 of the parties and have a real side-by-side comparison
18 about what the evidence might be.

19 Now, in this case, Exhibit 1 was some witness
20 testimony. Again, this was typed in; it wasn't
21 uploaded as a Word document. Other cases, we have had
22 exhibits that are -- that are knives, for example.
23 This was an auction dispute about a collector's Boy
24 Scout knife that didn't turn out as expected, and that
25 plaintiff put up the picture of the knife that was at

1 the auction site, I don't know which auction site it
2 was, and then an after picture showing this is what he
3 got. It was not as promised in that particular case.

4 Now, the juror side of the equation is very
5 interesting. The registration to be a juror is very
6 simple. We have kept the fields at a minimum. We
7 don't require addresses, but we do require this kind
8 of, you know, information, password, user name, and
9 that allows the jurors to be registered as members of
10 iCourthouse.

11 The jurors are then taken to the actual
12 registration area, where there's various demographic
13 criteria in menu fields that the jurors would enter in.
14 There's age categories, male/female, occupation
15 categories, levels of household income, highest
16 educational levels obtained and amount of internet use
17 per week.

18 The juror, as you can see, it just takes a
19 minute or two, is able to feed all that information in.
20 That's kept in our database about the juror and
21 available for litigants who would like to choose their
22 actual jury.

23 I'd like to show you the docket, an example of
24 the docket. Now, after you are a registered
25 iCourthouse member, you see not only the abstracts of

1 the case, which you can see without registering, but
2 you can also see the status of the case, and there's
3 live links to viewing trial books and actually getting
4 into the case to see whether you might want to be a
5 juror. So, it's -- there's a number of options there
6 in our case docket. We have plans, when more cases are
7 filed, to organize the case docket into subject matter
8 areas, but that's how the case docket looks now.

9 I'm being informed that we're running out of
10 time here. I would like to show you one more
11 interesting feature about iCourthouse that bests the
12 court system, and that is for the ability of the jurors
13 to ask parties questions. I have heard of a couple of
14 pilot studies in various states where jurors can do
15 that. Here at iCourthouse, the jurors can ask as many
16 questions as they want. When the questions are
17 answered, they are put up at the site like this.

18 So, in a sense, the jurors are able to cross
19 examine the parties on particular issues that may be of
20 interest to them, and this is a way for parties to
21 learn what interests jurors. I've been constantly
22 surprised when I've interviewed jurors at the end of a
23 jury trial what the jurors were interested in, what
24 they never heard about even though they wanted to. So,
25 this is a way for you to get that information in a very

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1 easy way.

2 One more view here and then I will close up.
3 Our panel cases where you can choose an actual jury, I
4 want to show you what we do with that demographic
5 information that we get from the jurors. If you have a
6 panel jury case, you fill out the demographic criteria
7 of the jurors you would like to see on your case. The
8 system then goes out, finds jurors who meet that
9 criteria and presents you with potential jurors that
10 meet your criteria, and you can see their actual --
11 where they live, what their individual characteristics
12 are.

13 Once you have that information, you can voir
14 dire or ask questions to the jury, and based on that
15 information select a panel jury much as a skilled
16 attorney would in court.

17 Just a minute -- just a brief comment on the
18 business model of iCourthouse. The basic peer cases
19 are free, and we want to keep it free for consumers to
20 air their disputes. We want to keep it free so that
21 our jury pool increases from the 3000 we have now to
22 100,000. I'd love to see that within six months or a
23 year.

24 But we do -- our real revenue model is using
25 this as a tool for attorneys in-house. We're

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1 developing an application service provider platform
2 that will allow companies and law firms to subscribe to
3 this, brand it with their own logos and so on and craft
4 a custom in-house jury pool for case evaluation that
5 would be entirely confidential.

6 iCourthouse, just as CyberSettle, is a
7 patent-pending set of features and functions. We have
8 60 patent claims pending. We're probably about six
9 months behind CyberSettle in terms of the backup at the
10 Patent and Trademark Office. It's a completely unique
11 idea, and we're looking forward to helping bring
12 dispute resolution and litigation and court-based
13 dispute resolution into the 21st Century with just a
14 very unique, easy-to-use, fun set of features and
15 functions.

16 I would like to close by thanking the FTC.
17 Only the FTC or a governmental body could bring all
18 these great ideas together and the attention of all
19 interested parties into one room. I think when we
20 leave tomorrow, everyone is going to have some new
21 ideas and be aware of some new ways to avoid disputes
22 or solve disputes once they arise.

23 I'm going to be here during the entire
24 workshop, and I would love to talk to any of you
25 individually if you have questions or would like to

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1 know about iCourthouse.

2 Thanks very much.

3 (Applause.)

4 MS. WELLBERRY: Thank you very much, Clyde.

5 We're over our time now, and I was wondering if
6 we could request your indulgence and take some
7 questions both from the moderators and from the
8 audience, because otherwise we will lose the
9 opportunity, and maybe break -- therefore we would be
10 breaking for lunch even later and then coming back a
11 little later.

12 The thing that struck me about those
13 presentations and the various businesses that you've
14 come up with is how different they each other, and we
15 couldn't have done a better job in picking very
16 different examples.

17 I have a question that I would like to address
18 to all three of you, and that is if you can give us
19 some sense of what the cost is to resolve each dispute,
20 if you have any way of deriving that cost, and that
21 obviously goes to the question of whether this would be
22 scalable or not.

23 MR. LONG: Well, to respond on behalf of
24 iCourthouse, our basic peer cases are free, and we fund
25 that free service by the other revenue-producing

1 aspects of the company. So, resolving a case at
2 iCourthouse if you're a consumer costs nothing and
3 takes just a matter of days.

4 MS. WELLBERRY: Right, I understand that it
5 costs nothing to the consumer, but I'm wondering what
6 the cost is to the business, because obviously at some
7 point you are going to have to figure out a way of
8 paying for it.

9 MR. LONG: Well, the way we do it, though, is
10 where -- the panel cases where you get to select a jury
11 does cost money, and attorneys pay for that, and we are
12 developing a subscription-based ASP platform, and that
13 will fund basically our operations. The consumer end
14 of this gives us jurors and also just provides a means
15 of dispute resolution for the public at large.

16 MS. WELLBERRY: So, your long-term business plan
17 has that service remaining free?

18 MR. LONG: Yes, it does. There's value to the
19 content of cases being put up, there's entertainment
20 value. If there's enough traffic, of course, there's
21 advertising opportunities, but we will always keep it
22 free for jurors, and for the parties who file peer
23 cases, they will always be free also.

24 Now, there's obviously some data we collect
25 about cases and about juror behavior, we may make that

1 available as an enhanced feature, but in order to put
2 your case on as a consumer, it won't cost anything
3 unless you would like some of those additional
4 features.

5 MS. WELLBERY: Thanks.

6 Jim?

7 MR. BURCHETTA: We get paid a transaction fee.
8 The insurance company pays \$25 on the upload of a
9 claim. When we get the other side to engage, the
10 lawyer or the claimant willing to come in to use the
11 system, we get paid another \$75 from the insurance
12 company. So, they paid a hundred dollars at that point
13 to get both sides, themselves and the other side, the
14 opportunity to settle a claim.

15 If the case settles, we get paid another \$400,
16 \$200 from the insurance company and \$200 from the
17 claimant. The claimant and the lawyers only pay if the
18 case settles. If the case doesn't settle, we get paid
19 from the insurance company, and there are no additional
20 charges to the consumer, claimant or to the lawyer.

21 MR. ABERNETHY: Yeah, for SquareTrade, there's
22 really two aspects of our business model. Until now,
23 within ebay and the pilot program at ebay, the solution
24 has been free for users. We're moving into the next
25 phase, and as I said, the two aspects are, A, charging

1 for dispute resolution. The exact amount has not been
2 set, but basically there will be a -- and it will also
3 depend by application, but I'll speak more broadly
4 outside of ebay.

5 There will generally be a flat fee with a
6 percentage of transaction proxying for the complexity
7 of dispute. The other aspect of charging and earning
8 revenues as a business is the trust aspect of our
9 solution, and that also will evolve in different ways,
10 one being as today, as a small business, you can pay to
11 subscribe to the SquareTrade Seal, and there's other
12 aspects in which the overall solution in itself,
13 whether or not the seal is involved, really adds the
14 liquidity and trust to the underlying markets. That
15 will also be priced and evolve over time.

16 MR. STEVENSON: Thank you.

17 Does anyone in the audience have a question for
18 our presenters?

19 One question I had was -- and this may be
20 related to Barbara's question, but are there -- as you
21 listened to the earlier presenters, are there
22 particular kinds of consumer disputes, and that can
23 obviously range from the sublime to the ridiculous,
24 that you think are particularly appropriate for your
25 respective models and certain kinds of consumer

1 disputes that you think really are not as suited to
2 your particular model?

3 MR. ABERNETHY: I'll speak first. I believe
4 that the majority of disputes that occur online are
5 really relevant to utilize SquareTrade's solution, if
6 just to use the first model of actually communicating
7 with the other party.

8 Where we see more need is where you have
9 something where it's -- you know, the underlying value
10 could be cash, but there are emotions and other
11 non-cash-based issues underlying them. So, even if
12 there is a credit card involved in the transaction,
13 even if it is a pure commodity, like a piece of
14 electronics, that's where the solution is more
15 relevant.

16 The other aspect of our solution is where there
17 is, you know, a lack of trust up front between the
18 buyer and seller. So, if you don't know who they are,
19 up front is where the media application is, because
20 most small businesses, most smaller sellers don't
21 necessarily have the budget or the experience in
22 providing customer service. So, it's not so much the
23 type of dispute but the type of user where this is a
24 highly relevant solution to, you know, add trust to a
25 marketplace for an individual business.

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1 MR. BURCHETTA: I think you have to be able to
2 handle every type of claim. You have to mirror the
3 real world, and the real world court system or judicial
4 system has to be able to handle small claims and large
5 claims, and, you know, our model is integrating our
6 double-blind bid process into online mediation/
7 arbitration to be able to do that across the board, and
8 there will be different pricing mechanisms or costs,
9 and obviously in the exchange area, with the large
10 consortium of B-to-B companies who are buying and
11 selling commodities or iron/ore, there could be one
12 pricing structures very different than the pricing
13 structures to someone who has a dispute over a \$75 item
14 that they bought on an exchange.

15 I think the challenge is to make the online
16 dispute resolution system accessible to the consumers
17 at the low end, and that cost, especially the very
18 small ones, should be virtually free to the consumer.
19 And I think models have to -- companies have to work
20 towards that. There should be either a small
21 registration fee commensurate with the value of the
22 issue -- of the product at issue or no fee at that end.

23 At the other end, I think, you know, the
24 companies and businesses who can use a system like
25 CyberSettle to resolve its disputes would pay market

1 price accordingly, and we're still pricing that, as
2 well. I mean, that's a very fluid thing.

3 MR. LONG: Well, as far as iCourthouse goes,
4 we're the cyber four walls of the courthouse, and just
5 as a courthouse can, you know, deal with family law-
6 related disputes, consumer-related disputes, commercial
7 disputes, any kind of case can be brought at
8 iCourthouse. We have had a recent case involving
9 sexual harassment in the workplace. There's a case
10 involving nicotine addiction, a claim against a tobacco
11 company. We have had personal injury cases, disputes
12 between neighbors, online auction-related disputes. It
13 really doesn't matter what it is.

14 We could really take and handle anything,
15 because we're giving a scalable, open-ended forum and
16 set of features whereby you can put a case on and have
17 it evaluated. So, there's no real limitation in that
18 sense.

19 MS. WELLBERRY: Susan? You have to speak into a
20 microphone. Otherwise, the transcriber won't be able
21 to...

22 MS. GRANT: Thank you.

23 I'd like to hear more about enforcement. Right
24 now SquareTrade seems to enforce because of the threat
25 of negative feedback, and I don't know as you

1 contemplate expanding your program how you plan to try
2 to help people enforce the decisions.

3 CyberSettle, I doubt you have any problem
4 getting insurance companies to pay the money at this
5 point, but you're talking about the possibility of
6 creating some sort of escrow or insurance-backed
7 program as you expand.

8 And iCourthouse, I have no idea how you try to
9 enforce the decisions that the jurors make. So, I'd
10 like to hear more about that.

11 MR. LONG: Well, as far as -- that's an
12 excellent question, and it's frankly one of the issues
13 that I was hoping to learn more about at the workshop
14 here today. The charge-back system is wonderful, it
15 just has a beautiful simplicity to it, and until we
16 really develop a way to do that at iCourthouse, what
17 you are going to see iCourthouse providing is a very
18 powerful case evaluation tool and a tool that leads
19 people to settle the case by seeing what the merits are
20 and coming to some sort of resolution.

21 I think that we'll be able to institute the
22 next great idea in terms of enforceability, but the
23 great thing about iCourthouse is once you have your
24 decision, if there's the other mechanism in place for
25 enforceability, here you have the decision to enforce.

1 So, I think that the solution, when it's figured out,
2 can easily be grafted on the system that we have now.
3 We have the courthouse now, and somehow we'll get the
4 bailiffs and people who will go out and enforce the
5 judgment.

6 MR. BURCHETTA: You know, we call the internet
7 an industry, but it's really not an industry. It's a
8 bunch of industries. I mean, we just happen to be
9 using the internet to transact business. And I think
10 every industry has to deal with it in its own way.

11 As you indicate, in the insurance area, we have
12 had -- in all of our claims, we have had not one
13 dispute over the use of our system or anyone who backed
14 out or reneged on a settlement. So, I guess we're
15 lucky in that sense.

16 But issues like credit card charge-back and
17 different industries getting together to provide
18 confidence and security for their transactional site by
19 providing some type of escrow, you know, or fund to
20 enforce a settlement, and we are working with a number
21 of different companies which are contemplating a type
22 of insurance product which could insure transactions in
23 some form, and there are a lot of different groups
24 working on this enforceability issue.

25 I think it's just too early to determine, you

1 know, which is going to win or which one is going to be
2 the most -- it's probably a combination of all of
3 those, you know, across the board.

4 MR. ABERNETHY: I've touched on it before, but
5 the internet is enabling a whole new realm of
6 transparency of behavior, both good and bad behavior.
7 The feedback form on ebay is a really incredible
8 example of how that really creates a trusting
9 environment. We believe that is really the root of
10 both having successful resolutions and preventing
11 disputes or increasing liquidity across all markets.

12 That's why we both work well within the
13 confines of existing marketplaces with strong community
14 or strong framework of performance, as well as we're
15 deploying what we're calling the SquareTrade Seal as a
16 means to actually bring that with you where you're not
17 actually in marketplaces. So, for a small business to
18 be able to bear a seal that says I've performed, I've
19 complied, and I've always come to the table and given
20 good customer service, and this is a means that before
21 that, you actually had no awareness. There's millions
22 of small businesses out there and individual sellers.

23 The internet and mechanisms like the
24 SquareTrade Seal enable people to bring that reputation
25 with them, use that as a means to attract customers, as

1 well as a means to protect the customers if a dispute
2 ever happens, and that really the seal is our next big
3 effort to create a much stronger enforcement mechanism
4 that goes far beyond just individual marketplaces.

5 MS. WELLBERRY: Yes, question up there? Would
6 you identify yourself, please, when you come to the
7 microphone?

8 MS. BOWMAN: Hi, I'm Becky Bowman with the
9 Maryland Attorney General's Office, Consumer Protection
10 Division.

11 How do you all visualize interfacing with
12 government consumer protection agencies in terms of
13 that next step of enforcement, where, for example, with
14 the seal, you may find that you have bad actors that
15 aren't giving your seal or have bad reputations, but to
16 what extent do you see working with government agencies
17 in terms of doing the steps along the way?

18 MR. ABERNETHY: Specifically for us, hopefully
19 in the next couple of weeks, we are already adding
20 basic fraud awareness and consumer protection
21 functionality, which will give consumers more -- what
22 we feel like is more powerful are the tools to prevent
23 or tools to actually interact in a framework where you
24 can avoid fraud, even though fraud will continue to
25 exist. So, that will involve -- and we've already

1 established discussions with the FTC to pass on, you
2 know, repeated performance, negative performances that
3 might warrant police action or enforcement action.

4 So, it's twofold. We'll be working directly
5 with these agencies as well as taking best in class
6 consumer protection thought processes and linking them
7 really in front of the transactions where it's a much
8 more powerful time to apply them.

9 MR. BURCHETTA: The same answer really, but
10 it's sharing information. I mean, I think part of the
11 responsibility we have is to report fraud or report any
12 statistics or data which would be relevant to
13 organizations like yours and to help educate the
14 consumer. I think as the internet grows, those kinds
15 of relationships have to grow, as well.

16 MR. LONG: As far as iCourthouse goes, I think
17 our role in interacting with government, and we
18 actually have some discussions pending with the federal
19 courts in the Northern District of California, is as a
20 tool or as an additional dispute resolution device that
21 the courts can use to deal with settling cases,
22 avoiding court backlogs and the like.

23 The tool itself is an empowering thing for
24 consumers to put their case on, not to have to
25 necessarily invest in going to a brick and mortar

1 courthouse or hiring an attorney. This is a way the
2 consumers for free can have their day in court, seek
3 their vindication and have a result that they can do
4 any number of things with, perhaps in conjunction with
5 a governmental entity or an administrative entity.

6 MS. WELLBERRY: Are there any other questions?

7 MS. SPRING-REIMAN: Hi, I'm Petra Spring-Reiman
8 from the European Commission, from Directorate General,
9 Internal Market.

10 I was very interested to hear from Steve that
11 you already have had some experience with cross-border
12 disputes. Can you briefly tell about the experiences,
13 about particular problems you have been facing, and
14 specifically the language problem, how you have tackled
15 that?

16 For instance, is it more expensive for the
17 supplier when the translation costs are involved?

18 Thank you.

19 MR. ABERNETHY: Could you repeat the last half
20 of that -- is it more expensive for what?

21 MS. SPRING-REIMAN: For the company, for the
22 company.

23 MR. ABERNETHY: Well, today, I can't get into
24 the exact specifics of the case due to the confidential
25 nature of them, but due to our marketplace partners, we

1 are dealing with international disputes by the very
2 nature of ebay and other marketplaces transacting --
3 having users all over the world. To date we have
4 handled it in a couple of ways. We have worked with --
5 in one particular case German language was used to
6 completely resolve the dispute. In another case, there
7 was a Spanish-English translation. So, today these are
8 really very early examples of how we recognize the need
9 to immediately internationalize the solution, even if
10 just applicable for multi-lingual application in the
11 U.S. alone. So, really it's a multiple-step process.

12 The scalability of actually getting
13 multi-lingual mediators is actually the easier nut to
14 crack just in a timing perspective, because there's
15 trained, skilled mediators all over the world. The
16 other aspect is making our site itself international in
17 terms of the text and the multi-lingual nature of that,
18 and that's really just a matter of time for us, but we
19 are, you know, taking early lessons by making what we
20 have work, leveraging the multi-lingual mediators that
21 we have on staff today.

22 MR. BURCHETTA: I just want to add to that, if
23 I could. We expect an increased cost in handling
24 trans-boundary, trans-national disputes because of the
25 cultural and language difficulties, but as Steve said,

1 we've found it very easy, surprisingly easy, to
2 identify qualified international arbitrators or
3 mediators who want to experiment with companies like
4 CyberSettle or SquareTrade to step in to resolve
5 disputes internationally, and much easier than we had
6 anticipated when we were, you know, in development of
7 our product, but there is an increased cost, but that
8 cost may flatten out as the usage continues, as well.

9 MR. LONG: Let me add just a word for
10 iCourthouse. We've been looking with great interest
11 into translation modules that are now available, and
12 some of them are quite good. We plan to offer that
13 feature at our site so that there won't be any barrier
14 based on language. We are very interested in having a
15 Spanish language version of our site. We've gotten a
16 lot of traffic from South America, Argentina, and once
17 you're -- in order to change the site into another
18 language, it's actually a very simple process to do.

19 We have even spoken with some of the major
20 Chinese legal portals or portals about having a Chinese
21 language version of iCourthouse. So, it really is an
22 international courthouse. That's definitely in the
23 future. It's just not at the site right now.

24 MR. ABERNETHY: I just want to conclude that
25 the international nut is to me one of the most

1 important aspects of making this solution really work,
2 because what -- the internet, as I said before, is
3 international by its nature, and it has to be --
4 engaging just in our initial architecture with ebay,
5 for it to be credible, for people to feel comfortable
6 transacting and taking advantage of what's out there,
7 it has to be an international solution. So, we do take
8 this very seriously, as I'm sure my colleagues agree.

9 MS. WELLBERRY: We will take just one more
10 question, and then since we are running about 40
11 minutes behind schedule, we will have to break. So, do
12 you want to ask your question?

13 MR. VALZ: Hi, Duane Valz, I'm working with
14 JAMS on its online dispute resolution initiative, and
15 this question may pertain more to SquareTrade and
16 iCourthouse just based on CyberSettle's current
17 business model, but it seems that the methods of
18 dispute resolution that you all discussed involved
19 getting facts from either the disputants or their
20 attorneys, and I was wondering if there were any
21 provisions or if you've given any thought to the issue
22 of incorporating substantive law and when that will
23 have to come into play, either in the consumer context
24 or the business context, because these are commercial
25 disputes, not -- and at iCourthouse you say you resolve

1 or address a wide variety of disputes. So, how do you
2 facilitate in the functionality of your site dealing
3 with substantive law?

4 MR. LONG: Well, for iCourthouse, as you can
5 see from the demonstration, there is really no barrier
6 to citing law and quoting law in the way that the
7 parties can present their case. So, for example, if
8 two attorneys in California want to have their case
9 evaluated, they can cite applicable law to the jurors.
10 They can cite California jury instructions, if they
11 choose to. So, really it's scalable to make the
12 process as complex or legally compliant as the parties
13 want to or are able to do.

14 And I'm -- I actually would like to talk with
15 you afterwards, because we've definitely spoken with
16 some people at JAMS, and I think that the iCourthouse
17 -- the features of iCourthouse really lend themselves
18 to working hand in hand with a professional neutral,
19 whether it be a retired judge or attorney, to further
20 the case resolution process.

21 MR. ABERNETHY: The way I -- we've been focused
22 on mediation, coming back to actually the prior
23 question, because really it is the most powerful means
24 to create an international solution. It gets over
25 jurisdictional issues. It gets around cross-border

1 issues. And as other facts have been stated earlier in
2 kicking off the session, it's a much more effective
3 mode of resolution when the parties have come to it.

4 That said, we're also working with individual
5 marketplaces who might choose to deploy different modes
6 of dispute resolution, which might include arbitration
7 in different settings. At that point, we would be
8 deploying rules of law, and we will really solve that
9 when we get to that particular business application.

10 MR. VALZ: But even mediators work with
11 substantive law as submitted by the disputants, right?

12 MR. ABERNETHY: Yeah, I think basically what
13 we've done is we've come down to commonly accepted
14 principles of mediation, and we really have been able
15 to -- you know, through the experts we have on our
16 panel as well as through the leadership of the
17 SquareTrade media network, we actually haven't run
18 into, you know, any issues that have, you know, caused
19 our growth to stifle.

20 MR. BURCHETTA: And I think the mediators take
21 into consideration the substantive law in helping to
22 mediate the issues. It doesn't have to be clearly
23 defined by statute, but, you know, they are using their
24 skill and judgment and are factoring that in trying to
25 guide both sides to a settlement.

1 MS. WELLBERY: Well, that concludes our morning
2 session. Thank you very much to the presenters. I
3 think you've given us an enormous amount to think about
4 and have really helped lay the groundwork for the
5 panels that will come later.

6 (Applause.)

7 MS. WELLBERY: Thank you all for adjusting your
8 schedules. We will reconvene at 2:00 this afternoon.

9 (Whereupon, at 12:45 p.m., a lunch recess was
10 taken.)

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1 AFTERNOON SESSION

2 (2:00 p.m.)

3 MR. STEVENSON: Okay, our first panel
4 discussion today is on charge-backs as a type of ADR or
5 a model for ADR, I guess a form of ADR perhaps. I
6 think it's one of the things that's important to have
7 an understanding of in thinking about this ADR area.
8 Some of our later -- our big panel scored the full
9 brass, and we will start off, though, with a more
10 intimate trio, if you will, to address the charge-back
11 issues. We have Russ Schrader from Visa, who has been
12 kind enough to join us; Jean Ann Fox from the Consumer
13 Federation of America; and my colleague David Medine
14 from the Federal Trade Commission to talk about these
15 issues.

16 Obviously a lot of people pay for a lot of
17 things by credit card, including online, and often
18 invoke charge-back procedures, sometimes resolve their
19 disputes that way. I thought one of the things that we
20 could start off by doing is by asking Russ to just walk
21 us through what is a charge-back, just at the nuts and
22 bolts level, if we've got Carol Consumer and she's got
23 a problem that she really didn't order something that's
24 appeared on her bill or if the charge appears on her
25 bill but the product doesn't appear at the door or if

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1 the product is different than what it was cracked up to
2 be.

3 Russ, can you walk us through that process and
4 just give us a little background on how this
5 charge-back system works.

6 MR. SCHRADER: Sure, absolutely. Let me take
7 you through a little bit of the charge-back system and
8 give you a few statistics and put the Visa system in
9 perspective, basically to lay a bit of the groundwork
10 for our discussion.

11 I am senior vice president and assistant
12 general counsel of Visa USA, and Visa and its member
13 financial institutions are on the cutting edge of the
14 issues associated with electronic commerce. As you may
15 know, the majority of electronic commerce transactions
16 today are, in fact, accomplished using a Visa payment
17 card.

18 Let me talk a little bit about the Visa
19 charge-back system. A charge-back is a return of a
20 transaction from the financial institution that issued
21 the card used by a consumer to the financial
22 institution that purchased the transaction from the
23 merchant.

24 Now, over the course of many years, Visa and
25 its members have developed the charge-back mechanism,

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1 and it's embodied in the Visa operating regulations.
2 We think that they provide a cost-effective means of
3 resolving transaction disputes involving Visa payment
4 cards, especially when the merchant and the consumer
5 are geographically dispersed. As a result, the
6 charge-back process, we believe, is a practical and
7 effective consumer protection.

8 Now, these charge-back rights apply to all Visa
9 credit and debit cards and to transactions involved
10 with U.S. and foreign merchants. Let me give you a few
11 statistics to put things in perspective with Visa. The
12 Visa payment system, of which Visa USA is a part, is
13 the largest consumer payment system in the world with
14 more volume than all the other major payment cards
15 combined.

16 In fact, Visa now has 1 billion cards
17 circulating worldwide. These Visa branded cards are
18 held by consumers around the globe. Last year we
19 general generated \$1.6 trillion in annual volume and
20 \$700 billion a year in the U.S. alone. At peak volume,
21 the Visa system can process 3800 card-related
22 transactions per second, and in 1999, the Visa network
23 processed 22 billion transactions, 11 billion credit
24 card transactions and 11 billion debit card
25 transactions.

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1 Now, when we talk about the nature of
2 charge-backs, it's really important to understand that
3 the rights and obligations are between the financial
4 institutions that issue the Visa cards and the
5 financial institutions that sign the merchants to
6 accept Visa cards. These rights and obligations come
7 from the membership in Visa and the exchange of the
8 Visa-branded transactions.

9 The charge-backs are permitted under Visa rules
10 for many reasons, including housekeeping reasons, like
11 duplicate posting, late presentment, incorrectly
12 entered amounts and failure to provide copies of
13 transaction records. There are other charge-back
14 rights that are permitted for types of disputes that
15 commonly arise between cardholder consumers and
16 merchants.

17 For example, the Visa operating regs permit
18 financial institutions to initiate a charge-back where
19 the cardholder does not receive the services and goods
20 purchased; where the goods delivered are not as
21 described; or where the goods are delivered and are
22 defective.

23 Now, the Visa member receiving the charge-back
24 has the right to dispute the validity or the
25 appropriateness of the charge-back, and ultimately Visa

1 will resolve disputes that are not settled directly
2 between its members.

3 Now, although Visa charge-back rules give no
4 direct rights to consumers, the Visa member banks have
5 long provided a worldwide level of consumer protection
6 that is issuers exercise on behalf of the Visa
7 cardholders.

8 Now, only a very tiny percentage of Visa
9 transactions are charged back. I'll give you some
10 April statistics. In April, Visa branded cards
11 generated over 830 million transactions worldwide.
12 That same month, only 780,000 transactions were charged
13 back for all of the reasons I mentioned, including the
14 household and housekeeping measures. Therefore, less
15 than one-tenth of 1 percent of the total transactions
16 in April were charged back.

17 Now, charge-backs are more common for internet
18 transactions than for other types of transactions, but
19 frankly it's difficult to say how much more common.
20 Not every merchant that operates both on the internet
21 and the real world, the so-called bricks and clicks or
22 click and mortar merchant, will report and break down
23 their sales by channel. Nonetheless, the overall Visa
24 charge-back rate for internet transactions, including
25 both domestic and international transactions, is

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1 estimated currently to be only 0.8 percent of all
2 transactions.

3 Now, there are a number of reasons why
4 charge-backs are higher on internet transactions than,
5 quote, "real world transactions." First, it's a new
6 channel, much the way mail order and telephone order
7 transactions were new a decade ago. Also, not all
8 merchants have developed the kind of back office and
9 customer service facilities that consumers have come to
10 expect, and those consumers use Visa issuers to help
11 them resolve their problems with the merchants.

12 Second, the nature of some digital goods
13 subscriptions that require the use of a payment card
14 account number for access result in customer confusion
15 on the nature of the subscription terms and the
16 payments.

17 Finally, the question of internet fraud, both
18 from international criminal rings to the so-called
19 friendly fraud and customer repudiation of charges.

20 Now, Visa charge-back rules do not attempt to
21 track all the possible consumer protection laws around
22 the world. Frankly, an attempt to do so would be
23 expensive, it would be an extraordinarily complex
24 charge-back system. In fact, the charge-back system
25 would break down entirely if a different set of

1 charge-back rights were established in every country
2 where Visa cards are issued or accepted in order to
3 reflect the particular consumer protection laws of that
4 country.

5 Nevertheless, the Visa charge-back rules do
6 cover most of the disputes that typically arise between
7 a consumer and merchant in domestic and international
8 transactions. The three common categories of internet
9 disputes are I didn't do it, I didn't get it, I don't
10 want it.

11 Now, first, the "I didn't do it" dispute, that
12 relates to situations where a cardholder claims the
13 transaction processed was without the cardholder's
14 permission. Under the Visa charge-back rules, the
15 issuer's allowed to charge back a transaction where a
16 card was not present and the transaction was processed
17 without the cardholder's permission or where a
18 fictitious account number was used and the transaction
19 was not authorized. To do so, the cardholder sends a
20 letter to the issuer disclaiming participation in the
21 transaction.

22 Now, this is the most common category of
23 internet disputes, but nonetheless, in April, of the 28
24 million defined internet transactions, less than
25 one-half of 1 percent were charged back under this

1 category, and this includes the type of internet fraud
2 I mentioned. Only about 134,000 transactions were
3 charged back under this category. And frankly, what's
4 more interesting about these disputes is very often it
5 is not a question of I didn't do it. It's actually a
6 question of I don't recognize it.

7 In fact, 50 to 60 percent of the disputed
8 transactions that fall in the "I didn't do it" category
9 result from the fact that the consumer simply does not
10 recognize a particular charge. Now, that happens when
11 a merchant uses a more formal name in billing on a
12 website or the name or the city location of the
13 merchant is not familiar or one that the cardholder has
14 visited.

15 These frankly are often resolved by a simple
16 telephone exchange or an e-mail between the consumer
17 and the merchant, and I think it's a testament to the
18 public's faith and good experience with Visa cards that
19 they contact their issuer even before the contact the
20 merchant.

21 Now, second, the "I didn't get it" dispute.
22 Now, this involves situations where a cardholder claims
23 that he or she did not receive ordered merchandise at
24 the agreed-upon location or on the agreed delivery date
25 or paid for the merchandise by other means. Now, an

1 issuer can charge back a transaction under these
2 circumstances by sending a letter to the issuer
3 supporting his or her claim.

4 Now, for U.S. domestic transactions, the
5 cardholder is asked first to contact the merchant and
6 try to resolve the problem. With international
7 transactions, the cardholder is encouraged but not
8 required to do so.

9 Now, in April, of the 28 million internet
10 transactions worldwide, less than 2000 transactions, a
11 minuscule 0.006 percent, were charged back under this
12 category.

13 Now, third, the "I don't want it" category of
14 internet disputes. These are the so-called quality
15 disputes. The merchandise is broken, it's not what was
16 ordered, it's the wrong color, it's the wrong size or
17 it's not as described.

18 Now, these are the toughest kinds of disputes
19 to deal with because of the value judgments and the
20 sometimes unreasonable consumer expectations involved,
21 as well as cultural differences about what a purchase
22 agreement involves.

23 Now, several different Visa charge-back rights
24 address these types of disputes. In April, of the 28
25 million internet transactions worldwide, only about

1 4000 were charged back under this category, again a
2 tiny 0.14 percent.

3 Now, the charge-back rules for international
4 transactions have been adopted to enable issuers of
5 Visa cards to address the fundamental concerns of their
6 cardholders, and incidentally, to reinforce the
7 reputation of Visa as the world's best way to pay.

8 Now, Visa charge-back rules do not correspond
9 in every respect to every country's consumer protection
10 laws, because charge-back processing, it's expensive,
11 it's complex, and as a private contractual adjudication
12 process, the charge-back rules must be clearly and
13 consistently defined for each participant.

14 MR. STEVENSON: Russ, let me turn at this point
15 to just ask David to fill us in a little bit on what
16 the legal regime does look like as a background to that
17 just basically the United States, and then, David, if
18 you might also comment generally what your
19 understanding is on an international level, how that
20 works.

21 MR. MEDINE: Thank you.

22 Russ described the charge-back system, which
23 really provides the backbone or the foundation for
24 processing consumer disputes, and as he pointed out,
25 each country has its own -- may have its own set of

1 laws. In the United States, we have a rather rigorous
2 and comprehensive law that governs disputes with credit
3 cards that have really provided consumers with a lot of
4 confidence in using credit cards as a payment
5 mechanism, particularly on the internet, and that's the
6 Fair Credit Billing Act, which is part of the Truth in
7 Lending Act.

8 Basically if consumers have disputes, the
9 credit card issuer who issued their card has to process
10 that dispute, and then ultimately, if they conclude the
11 consumer is correct, then they would process a
12 charge-back through the Visa or MasterCard or American
13 Express or other system much the way that Russ
14 described.

15 The kinds of disputes that consumers can raise
16 legally under the Fair Credit Billing Act include
17 unauthorized charges on their cards, which, of course,
18 is a great concern for consumers on the internet, and
19 it's a comfort to know that they have limited liability
20 of up to \$50 and, of course, many of the major issuers
21 have announced that they impose no liability.

22 Consumers can also contest if there's the wrong
23 amount on their credit card bill or the wrong date,
24 that they didn't accept or weren't delivered the goods
25 as promised, mathematical computational errors, their

1 failure to post payments or credits on their credit
2 card bill, and also, as I said, if they simply just
3 don't understand a charge on their bill, they have a
4 right to get an explanation for the charge, and, of
5 course, often times that resolves the dispute.

6 To trigger this process, consumers do have to
7 send a written request to the credit card company at a
8 specified billing address, and they have to do so
9 within 60 days after receiving their bill. And again,
10 if the consumer prevails in this process, they will get
11 a charge-back through the charge-back system.

12 As regards international transactions, one
13 thing that it's important to keep in mind, if Americans
14 are using a card -- an American-issued card, they have
15 all their rights, even if they use the card abroad, to
16 charge back. So, in a sense it's a good protection not
17 only on the internet, even for domestic internet
18 transactions, but for international internet and even
19 international offline transactions, as well, where they
20 have a chance, once they get home and they get the
21 credit card bill for those shoes bought in Italy or
22 that watch in Switzerland, it wasn't billed at the
23 proper amount, they have every ability -- under
24 American law, they have a right to dispute that charge,
25 to have their credit card issuer investigate that, and

1 if they are right and the charge was incorrect, process
2 a charge-back through that Swiss watch dealer or the
3 Italian merchant.

4 There are also a separate set of provisions
5 with regard to quality issues that are important to
6 keep in mind, and that is, if you want to dispute not
7 that you got the goods or that the amount was correct,
8 but they just weren't of the quality that you expected
9 or were promised, there's some limitations there. The
10 amount in dispute has to be over \$50, and the purchase
11 has to be within your home state or within a hundred
12 miles of your billing address, although many states
13 will treat your home as the address for telephone
14 transactions, which could even theoretically include
15 international transactions.

16 MR. STEVENSON: So, as I understand it, then,
17 Russ, the Visa agreement is what is governing the rules
18 that you're applying, which makes it extend in some
19 cases beyond what the law actually requires. Is
20 that --

21 MR. SCHRADER: That's right. The Visa
22 charge-back rules, which is a contract between the
23 issuing institutions, are very important goals to help
24 keep consumer trust and the Visa reputation, to
25 encourage them to use Visa cards over the internet and

1 in the real world.

2 MR. STEVENSON: Okay. And you did make the
3 point, I think you made it in your comment, that these
4 are not -- that that agreement doesn't itself infer
5 rights on consumers.

6 MR. SCHRADER: That's correct.

7 MR. STEVENSON: Jean, and then maybe following
8 on that point, what concerns are there that consumers
9 might have with this system? I mean, when Russ tells
10 the story, it sounds pretty good. So, it's just
11 helpful to identify what particular concerns consumers
12 might have in this venue.

13 MS. FOX: Well, definitely consumers who use
14 credit cards to shop online have an extra level of
15 protection that they don't have when they use other
16 payment mechanisms, and the complaints that come into
17 the Internet Fraud Watch Program at the National
18 Consumers League, for example, the lion's share of the
19 complaints involving fraudulent transactions involve
20 paying with money orders or checks or cash. So, the
21 use of the credit card provides a level of protection,
22 although an awful lot of consumers are anxious about
23 giving their credit card number online in order to take
24 advantage of that protection, because they fear that
25 the number will be stolen, misappropriated or lost.

1 So, there's a gap between what consumers know about
2 their protections and what they actually are.

3 And there is -- this is a multi-layered process
4 here. On the bottom are the legal rights and
5 protections that American law gives to American
6 consumers, and in other countries of the world, there
7 are some of those protections but not as extensive
8 typically, and then on top of that you have these
9 essentially private contractual arrangements within
10 each of the member agreements at each of the credit
11 card companies.

12 They don't see that as a consumer entitlement
13 or a consumer right. They see that as a technical
14 arrangement between businesses that serve to benefit
15 consumers, but it's not something you have the right to
16 demand. And to the extent that they go beyond the law,
17 for example, you know, Visa says that they cover both
18 debit card transactions as well as credit card, you
19 know, that's a benefit, but it's not a right you can
20 insist on.

21 In talking to consumer protection officials who
22 handle individual consumer complaints, they tell me
23 that it's very difficult for someone outside the credit
24 card member community to know what the rules are. The
25 Visa master agreement's not available for other people

1 to read and understand, and therefore, each bank may
2 interpret the rules a bit differently, and a person
3 trying to resolve a complaint doesn't necessarily know
4 what the rules are for charge-back arrangements.

5 MR. STEVENSON: Okay. Let me, if I could just
6 insert a little factoid here, as Jean Ann mentioned,
7 certainly some of the statistics do suggest that credit
8 cards do add a level of protection, and from our own
9 numbers, we were looking at the Consumer Sentinel
10 statistics for 1999, despite the billions and trillions
11 involved in credit card transactions, only 24 percent
12 of the complaints where people reported a method of
13 payment involved credit cards.

14 Let me ask you, Russ, to follow up on a point
15 you made about the charge-back system breaking down or
16 being burdened if every country imposed charge-back
17 rights. Could you spell that out a little bit, what
18 you see as the problem, why that might occur?

19 MR. SCHRADER: Sure. Well, Visa cards are
20 issued in 180 countries around the world, 180 different
21 legal regimes, 180 different ways of thinking about
22 what is the appropriate balance of consumer rights
23 between a creditor and a merchant, and then 180 things,
24 taking two at a time, I can't do the math, but then you
25 come to a conflict of law and jurisdictional issues.

1 So, when we're trying to figure out how the law
2 of the merchant, the law of the consumer, where a
3 particular transaction took place, the permutations and
4 possibilities and frankly the conflicts between the
5 line to be drawn between consumer rights and finality
6 of payment of merchant rights would be absolutely
7 impossible to monitor.

8 MR. STEVENSON: You mentioned different kinds
9 of transactions where there's the sort of -- I can't
10 remember exactly, but I didn't charge it, I didn't get
11 it or I don't like it.

12 MR. SCHRADER: Um-hum.

13 MR. STEVENSON: Is it fair to say that the --
14 especially the third category that may be more time
15 intensive to handle as a transaction matter?

16 MR. SCHRADER: Well, I think whenever you --
17 it's also the smallest number of transactions so far,
18 and I think that the costs -- I don't think anybody's
19 really broken them down by type of charge-back, but I
20 think what we've seen is that a good faith effort to
21 resolve the issue immediately between the cardholder
22 and the merchant does make a lot of the things go away,
23 50 to 60 percent of the "I don't recognize it."

24 Some of it also has to do with working with
25 reputable merchants and making sure that as some of my

1 consumer groups say, if a deal looks too good to be
2 true, it is, and the internet, unfortunately, lends
3 itself to people who may be engaged in shark practices.

4 One of the things that you mentioned, Jean Ann,
5 was fraud and payment through other mechanisms. The
6 fraud issue, even though it is a much smaller number
7 than the "I didn't do it" is a very important issue to
8 Visa and to everyone in this room, because the people
9 who are involved in fraud are making the channel
10 problematic for people who do want to use it and to
11 have good trust in it, and we have worked extensively
12 with the FTC, with Commerce, with the Secret Service
13 and others, because we feel very strongly that internet
14 fraud needs to be addressed quickly and sternly to make
15 this a good medium where people feel comfortable to
16 shop.

17 MR. STEVENSON: Okay, thank you.

18 To follow up on the issue we started off by
19 talking about, there's what the agreement covers, the
20 Visa operating agreement I guess it would be called,
21 and what the legal regime covers. One issue that I
22 think someone threw out was the issue of debit versus
23 credit cards, and maybe I could ask you, David, to talk
24 about what the significance of the different legal
25 regimes is there for consumers and why does it work

1 that way or should it work that way.

2 MR. MEDINE: Well, there are very significantly
3 different rights for consumers with regard to debit and
4 credit cards, also different liabilities, although
5 through some voluntary efforts recently there have been
6 some movements to try to equate those liabilities.

7 But debit is really treated more like a cash
8 transaction than a credit card transaction in terms of
9 your ability to dispute a lot of it, quality issues,
10 basically you've purchased the good as if it were by
11 cash. You can, of course, dispute the amount of the
12 debit on your bill, and, of course, you do have
13 protections for unauthorized use of your debit card,
14 but there aren't the array of consumer protections
15 available under the Fair Credit Billing Act for
16 debit-type transactions. So, it's probably my advice
17 to not use the debit card on the internet, because I
18 think you are likely to get into Jean Ann's complaint
19 category a lot faster than if you have your credit card
20 billing rights.

21 I would also like to add that in terms of using
22 charge-backs as a dispute resolution mechanism, Russ
23 pointed out that there is a tremendous advantage that
24 Visa and others are in 180 countries. So, it starts
25 off with an international reach of a charge-back

1 system. The question is what level of rights are
2 protected to make it a type of dispute resolution
3 system that provides consumers enough protections?

4 We certainly think that the American rights
5 provide very strong protections, but as the problem is
6 in other countries, cardholders in that country may not
7 have comparable rights. So, the question is, will the
8 credit card system be prepared to move up to a higher
9 essentially level of rights on a voluntary basis, maybe
10 not have 180 conflicting rights, but operate at a very
11 high standard, maybe even adopting -- far be it for me
12 to say -- American standards to provide protections so
13 that, therefore, consumers around the world can use the
14 credit card system and be assured that they have a
15 dispute resolution mechanism that's easy, free and can
16 be accomplished very quickly.

17 MR. STEVENSON: What do you think of that,
18 Russ, those possibilities that David mentions?

19 MS. FOX: Don't feel on the spot or anything
20 here, but go ahead.

21 MR. SCHRADER: No pressure here.

22 I think, first of all, it's something that --
23 to understand the charge-back system is a private
24 contractual right among Visa members, and consumers do,
25 in fact, benefit from it. There are a lot of different

1 views as to what sufficient protection is, which is the
2 phrase David used, and I'm not sure that 180 countries
3 would agree on what that meant.

4 Therefore, you know, frankly I am here talking
5 about Visa USA, and I can't speak on behalf of 180
6 countries as to what would be the proper, sufficient
7 balance for the consumer protection, but I think that
8 in the U.S. certainly, the voluntary efforts of Visa
9 have shown that it works, and I would expect that
10 people would look at it elsewhere and see what multiple
11 approaches would work to encourage the commerce,
12 whether it's other ADR issues, whether it's a code of
13 conduct for merchants, whether it's consumer education,
14 a lot of different things.

15 MR. STEVENSON: Do you think -- to follow up on
16 David's related point, do you think if -- we were
17 talking earlier about the concern about the system
18 breaking down if there were many sort of rules of the
19 game imposed. Does the same concern exist if there are
20 more uniform rules imposed than if they were similar to
21 the ones that exist in the U.S. framework?

22 MR. SCHRADER: I can't speak to that. I
23 honestly cannot -- that's pretty much a systems issue
24 as to what are the costs and what the burden would be
25 worldwide. I frankly couldn't say.

1 MR. STEVENSON: One thing that I had wondered
2 about in returning then to the category of "I didn't
3 like the product," and I suppose the first category you
4 described of "I didn't make the charge" or --

5 MR. SCHRADER: Right, "I didn't do it."

6 MR. STEVENSON: -- or "I didn't do it," maybe
7 first and foremost -- or in a sense, they're
8 approaching the issuer, that's an issue between the
9 issuer and the consumer, whereas the category of "I
10 don't like it" or the third category, it wasn't as it
11 was cracked up to be, clearly involves the merchant in
12 some way, yes, they did order the product, yes, they
13 did get it, no, they don't like it.

14 Are there other models that -- are there
15 concerns that Visa has about handling those claims
16 where they are in more of an intermediary role, in a
17 sense, in terms of the costs of handling those
18 transactions?

19 MR. SCHRADER: Well, the "I didn't do it" is a
20 very interesting one for a couple of different reasons.
21 The first one is, you know, once again, it's not "I
22 didn't do it," it's "I don't recognize it," and more
23 than half the time, those are simply resolved by a call
24 to the merchant, which as I pointed out is a
25 fascinating thing, that people do, in fact, call the

1 issuer before they call the merchant. I suppose that
2 means we do a good job in having built up consumer
3 trust in Visa cards.

4 Now, the other part that is not resolved
5 probably then falls into fraud. Now, when you talk of
6 internet fraud, there's a couple different kinds of
7 internet fraud. One kind that seems particular to the
8 internet is the so-called friendly fraud, and some of
9 that is -- you know, there's a joke that a lot of it
10 concerns digital goods, and that is software, adult
11 content, music, where you are downloading some things
12 and may not fully download, and when you go back to get
13 the rest of it or to update it, you're charged again,
14 where you shouldn't have been charged twice, you're
15 charged multiple times. And that's easy enough to take
16 care of. You didn't do it the second time.

17 On the adult content digital goods sites, there
18 certainly is question there when people sign up for a
19 -- sign up for a subscription or sign up for an adult
20 content site, the anecdote is, you know, the spouse
21 opens up the bill and says, What's this charge? I
22 didn't do it. And that is part of the -- and that's
23 part of the friendly fraud.

24 But there still is, you know, a very important
25 level of internet fraud of the kind that Jean Ann

1 raised, and that we take very seriously, and that's
2 something that we do want to address the vigorous
3 enforcement of in cooperation with law enforcement
4 officials. That is illegal today, that should be
5 illegal, and it should be prosecuted fully.

6 MR. STEVENSON: Did you want to add something
7 to that, Jean Ann?

8 MS. FOX: That's okay.

9 MR. STEVENSON: I was going to ask you whether
10 the -- someone mentioned that the Visa operating
11 agreement, as I understand, is not generally available.
12 Is that something that -- the terms under which these
13 transactions are resolved something that could be made
14 available, or what are the concerns involved?

15 MR. SCHRADER: Yeah, it's a private contract
16 between the merchant's bank and the merchant, and just
17 like any other private contract, it has pricing terms,
18 it has some marketing incentives, it has ability to go
19 by the different rules, and no merchant I think would
20 like to have any or all of its private contractual
21 agreements made public to the world, both for a
22 competitive matter and just simple business practice.

23 MR. STEVENSON: Are there questions that anyone
24 in the audience would like to ask our panelists?

25 MS. FOX: Could I address a point he just made?

1 MR. STEVENSON: Yes, sure.

2 MS. FOX: When CFA and other groups filed their
3 comments for this workshop, we pointed out some
4 criteria that alternate dispute resolution systems
5 ought to meet, and some of those are that everybody
6 knows the rules and that consumers are informed about
7 how to exercise their rights, and the group making the
8 arbitration decision or handling the dispute is
9 independent. And while we believe that the charge-back
10 system is a valuable consumer protection, especially
11 based on law, which could be improved -- for example,
12 we think that debit cards ought to be treated the same
13 as credit cards as a matter of law and not just
14 benevolent policy, so that there's no dispute about
15 that in the future -- but the charge-back doesn't meet
16 basic criteria of what would make a good alternate
17 dispute resolution system.

18 So, we view this as a necessary answer but not
19 the total answer. It will take off the top of the
20 dispute some of the things that are easily solved by
21 unauthorized use or billing errors or preserving your
22 claims and defenses against the merchant and then the
23 merchant not pursuing those directly because it's not
24 worth their while to do that, but it isn't an
25 independent, transparent, available to all users

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1 alternate dispute resolution system.

2 MR. MEDINE: Well, just to add to that, one of
3 the obviously challenges in the international context
4 are jurisdictional issues, and essentially if a credit
5 card issuer has decided to stand between you and the
6 international merchant, it provides a ready entity
7 which to litigate against in the United States in a
8 small claims court or a convenient forum over the
9 claims and defenses or other types of rights that
10 consumers may have. That may -- obviously in the first
11 instance you hope the dispute will be resolved through
12 the charge-back dispute resolution process, but failing
13 that, you don't have to wrestle with the problem of how
14 do I sue a foreign merchant, how do I enforce my
15 judgment, which country's laws apply. You have a much
16 cleaner jurisdictional issue if the consumer doesn't
17 want to litigate their rights ultimately in court.

18 MR. SCHRADER: And I agree, the charge-back
19 mechanism is a private contractual one, and it is
20 between the financial institutions. It's not perfect,
21 but it works well. When you look at the numbers and
22 the fact that things have been resolved, I think we're
23 very proud of the trust that consumers have put into
24 the use of Visa cards.

25 The charge-back system and the rights certainly

1 are not exclusive. A consumer does have continuing
2 rights and opportunities to work with any other ADR
3 system out there and to pursue litigation rights that
4 they may have.

5 MR. STEVENSON: Thank you, Russ. We have a
6 questioner in the back, if you could identify yourself,
7 please.

8 MR. BUDNITZ: My name is Mark Budnitz. I teach
9 at Georgia State College of Law.

10 The focus of the discussion has been on credit
11 cards and the charge-back model, but what I've read in
12 the literature from American Banker Newspaper and other
13 trade publications is that what the major card issuers
14 are aiming towards, their goal actually is to try to
15 get people to use debit cards more and more and less
16 charge -- credit cards.

17 So, I was wondering from Russ whether that's a
18 true characterization, because if it is, then that
19 means consumers have a real problem. David Medine
20 mentioned just a few of the differences, but there is
21 -- for unauthorized use with a debit card, if you don't
22 report it within two days of discovering it, the
23 liability goes up to \$500. If you don't report it
24 within a certain amount of time after you receive your
25 monthly statement with a debit card, then you have

1 unlimited liability up to the amount of your card --
2 the amount in your account.

3 The major problem is that with a credit card,
4 you haven't paid anything yet. With a debit card, the
5 money is out right away. Visa calls its card a check
6 card. Of course, with a check, you can -- the check
7 card is what they call the debit card. With a check,
8 you can stop payment. With a debit card, you can't
9 stop payment.

10 And so my real question is, should we have a
11 serious concern that there's going to be this marketing
12 effort to get people to go from credit cards to debit
13 cards, because if that is going to be the trend and
14 it's going to include online transactions, there's a
15 real problem.

16 MS. FOX: I would say yes, there is. If we're
17 going to have convergence of payment technology, we
18 need to have convergence of consumer protections, and
19 all of the methods used to pay online should move up to
20 a level of protections that will inspire consumer
21 confidence and make the online marketplace work well,
22 and I know that's quite a challenge, but we have been
23 arguing for quite some time that if you are going to
24 have the same piece of plastic used as both a credit
25 card and a debit card, that the same protections should

1 apply.

2 Consumers shouldn't have to stand at the
3 terminal and say, am I using this as a credit card or
4 debit card today, how much money would I like to lose
5 out of my checking account?

6 MR. SCHRADER: Well, I think that -- to answer
7 your question, as well, Visa wants you to feel
8 empowered to use whichever Visa product you want at
9 that particular time. If you want to have the money
10 come from your checking account using your Visa debit
11 card, that's terrific. If you want to use a Visa
12 credit card, either for a reward, such as airline
13 miles, or because you want to finance a purchase for a
14 certain period of time, that's terrific, too.

15 We do understand that as more and more
16 customers are becoming comfortable with debit cards,
17 they are concerned about it. That's why when Visa
18 enacted its zero liability policy on unauthorized
19 transactions, it clearly applies both to debit and to
20 credit cards, as do the Visa charge-back rules, as
21 well.

22 MS. FOX: Does that apply to claims and
23 defenses rights that are only conferred under the Truth
24 in Lending Act?

25 MR. SCHRADER: I am talking about the

1 charge-back rates rather than the --

2 MS. FOX: Right, but the charge-back on claims
3 and defenses assertions under Truth in Lending, as
4 well, and it's my understanding that that doesn't
5 happen necessarily with the debit card.

6 MR. MEDINE: There are clearly far more limited
7 rights, and again, as Professor Budnitz pointed out,
8 there's a very significant difference, which is that if
9 your debit card is misused, your whole bank account
10 could be wiped out until the dispute is resolved, where
11 in the credit card context, you just have not paid the
12 bill while the dispute is pending. So, that could be
13 very significant, obviously, for consumers.

14 On the short term, clearly it's a consumer
15 education challenge, which is consumers need to
16 understand if they use their debit cards and want to
17 have their checking accounts debited what the
18 consequences of that may be, particularly with unknown
19 merchants or foreign merchants, as opposed to the
20 protections that a credit card provides.

21 MR. SCHRADER: Yeah, although once again, the
22 practice in the market with respect to the Visa cards
23 is prompt recrediting, zero liability, and to resolve
24 these things as quickly as possible.

25 MR. STEVENSON: Okay. Are there other

1 questions from the audience?

2 (No response.)

3 MR. STEVENSON: No? All right, then, we will
4 thank our panel -- oh, there is? Yes, sir.

5 MR. JOHNSON: My name is Philip Johnson. I'm
6 senior legal counsel to the International Chamber of
7 Commerce in Paris, and I just wanted to make a couple
8 of points.

9 First of all, in France, we only have debit
10 cards. We don't have credit cards. Everybody in
11 France knows that if you have an error on your bill, it
12 will never, ever be straightened out.

13 (Laughter.)

14 MR. JOHNSON: And this is despite the fact that
15 these cards are Visa and MasterCard International and
16 so forth, but there's another point about the idea of
17 getting some kind of coherence between the different
18 systems. In France, the main reason that we have debit
19 cards instead of credit cards is to hold down consumer
20 debt, and they have been very successful at doing that,
21 and it's contributed highly to the financial situation
22 that France finds itself in today. So, it's not just a
23 consumer issue.

24 It has widespread economic issues for many
25 countries, and this is true throughout the EU. If you

1 talk to representatives from the EU, you ask them why
2 e-commerce hasn't taken off in the EU the way it has in
3 the States and Canada, the first thing that will come
4 up is the credit card situation.

5 MR. STEVENSON: Okay, well, thank you. We
6 would like to thank our panelists, David, Jean Ann and
7 especially Russ, who was willing to be very candid in
8 talking about his industry and bring the numbers, the
9 statistics, and we really appreciate all of that input.
10 Thank you.

11 (Applause.)

12 MR. STEVENSON: If I could ask now the
13 panelists for the next panel to come on up, and we will
14 move right ahead to the next discussion. Thanks.

15 (Pause in the proceedings.)

16 MR. STEVENSON: Okay, we are going to move on
17 now to the incentives panel, and actually I guess Henry
18 Perritt said earlier, well, incentives means politics,
19 but here we actually meant incentives, and what are the
20 incentives that industry and consumer and governments
21 have to participate or not participate in developing
22 ADR for the global online marketplace.

23 We would like to start off -- the format of
24 this part of our program is that we were going to have
25 -- we're honored to have with us John Bell, a member of

1 Cabinet from the European Commission, with us to start
2 off with a brief presentation, and we will then move to
3 a panel discussion with the various panelists that you
4 see arrayed before you and that are in the program and
5 to talk about what -- it's kind of like what's my
6 motivation here? What is motivating businesses to
7 engage in these programs or not? What kinds of
8 incentives do consumers have to use them or not? And
9 what are the interests that governments have in
10 connection with this process?

11 And with that, if we could turn to John Bell
12 and hear from him, and then we will get the discussion
13 started. Sir?

14 MR. BELL: Thank you very much.

15 First of all, just to say a word of thanks for
16 inviting people over across the water to attend and
17 participate in this very useful and interesting
18 workshop. It's part of a pattern of cooperation which
19 was established when David Byrne came over, my
20 commissioner, to meet with Robert Pitofsky and with
21 Mozelle Thompson, and it's something which we would
22 like to intensify.

23 I just point out that we have a number of
24 colleagues from different services in the Commission
25 here, and it's a good opportunity for us to sit down

1 and talk and move the whole process forward.

2 To pick up on the theme of the last questioner,
3 the reasons why in the past e-commerce hadn't taken off
4 to the same extent in Europe as in the U.S., I think it
5 revolves around one word, and the one word is service.
6 Somebody once said that the only place you're
7 guaranteed good service in Europe is on a tennis court,
8 and I think there was an element of truth in that.

9 People also used to view the EU as a kind of an
10 Ayatollah of regulation, always wheeling out the big
11 regulatory guns and to crack the walnuts of innovation.
12 I think there has been a change in Brussels, much as
13 there's been a change in Tehran in recent months, with
14 the launch of an entirely new approach to the
15 challenges which the new economy has raised for the
16 European economy and the European society.

17 It was discussed last week by President Clinton
18 and the EU authorities at the summit, and what it is is
19 a whole new approach to try to bring the European
20 economy online, to try and develop a service economy, a
21 slightly alien concept in various parts of Europe but
22 one which is necessary in the new context of a changing
23 world.

24 When we talk about a new context, listening
25 this morning, it was very interesting to hear the very

1 imaginative presentations coming from the technology
2 community. I think we have to realize for
3 policy-makers and the policy-making community, which is
4 now wider than government, the policy-making community,
5 if you like somebody calls it the new "netocracy,"
6 where you have people in technology, people in the law,
7 people in business and people in government trying to
8 map out this new landscape as we move along.

9 We have to realize that technology is not just
10 a tool now. It has become a context, and the context
11 is transforming everything from the presuppositions
12 which have informed business to the understanding and
13 meaning of citizenship, and that means that the
14 incentives for business, the incentives for government,
15 the incentives for all those involved in this new
16 society are significant indeed. It's basically you
17 have to innovate or, as somebody said recently, you'll
18 end up as roadkill on the information superhighway, and
19 that applies to us all, in maybe not so graphic terms
20 one hopes.

21 We have seen, for example, how the inability to
22 react confidently and in a consensual way to other
23 technology kind of problems led to issues at Seattle,
24 and to avoid Seattle Syndrome, if you like, what has
25 happened certainly in Brussels and what is happening

1 in our relationships with other major trade partners is
2 that we're working on the basis of consensus, to try
3 and bring people together in the policy-making process
4 as stakeholders to try and map out this path in this
5 new economic, political and legal landscape.

6 What does that mean in practice? Well, it
7 means in practice there's been a new framework policy
8 of the new Commission called the Europe Initiative
9 launched recently. That attempts to bring Europe
10 online in terms of creating faster internet access,
11 investing in people and skills and trying to stimulate
12 use of the internet. That is the three basic focal
13 points of this enormous program which will encapsulate
14 redefinition and reconfiguration of policies right
15 across the board, from education to consumer
16 protection.

17 And the area in which I'm active and in which
18 my Commission is active in consumer policy, that means
19 that we have now to climb out of the trenches that have
20 been so comforting for so many years and where in the
21 offline economy, business and consumers have felt it
22 comfortable enough to snipe at each other at a
23 distance, and now get down to the difficult business of
24 building on a consensual basis new policies for a new
25 world.

1 In practice this means we're launching an
2 eConfidence initiative to focus on basic issue, which
3 in one word, if you like, and we are all talking about
4 today, the word of trust is an invaluable resource, and
5 it's the currency, if you like, of brand names, and
6 it's the currency which will make or break those who
7 try and develop new products and new opportunities in
8 the internet.

9 To develop trust, we need to speak the language
10 of those who are actually operating on the internet,
11 and that means we need to work together with our
12 operators, with our international trade partners and
13 with the wider business community. For consumers this
14 means that we're going for a three-pronged approach,
15 and we have, as everybody knows, and I don't intend to
16 go into the detail of this, we have a legal safety net
17 which has been subject to much discussion dealing
18 jurisdiction and applicable law under the shorthand of
19 the Brussels and Rome Conventions.

20 Our policy is that this should be a last
21 resort. This should be, if you like, rendered academic
22 by a series of real world, practical policies, which we
23 will elaborate with our business, political and legal
24 partners.

25 The second point, then, is how do we get to

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1 this new or promised land of opportunity and growth for
2 everybody? Well, we heard a number of things this
3 morning about different aspects of policy. We are
4 talking about ADR. Upstream from ADR, you have the
5 confidence-building measures, things like charge-backs,
6 which were just discussed, and I must say that this is
7 certainly one area where we would very much welcome
8 U.S.-type standards in Europe and to develop the kinds
9 of services which will develop markets and build market
10 share, in fact, for the credit card companies and
11 develop financial services as a whole, while it's
12 providing the kinds of services that tempt people into
13 the water of internet transactions.

14 Secondly, and I think very importantly, is the
15 initiative on codes of conduct and trust marks. There
16 is a problem of proliferation. There is perhaps too
17 much genius invested at the moment in the field of the
18 information society, producing many interesting and
19 competitive and commercially viable propositions, but
20 from the consumer's point of view at the moment, it's
21 getting difficult to see how those who are all trying
22 to reach this goal of best practice in business
23 encompassing trust and confidence, can get the kind of
24 recognition that they will need from consumers in a
25 cross-border environment.

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1 This morning's remarks were very interesting,
2 but the real difficulties of actually operating in a
3 multi-lingual world, the borders we're talking about
4 are not those of jurisdiction and applicable law. They
5 exist in the minds and the cultures and in the
6 languages of the societies that we have to do business
7 with, and these are not problems that we will easily
8 wish away, as we know at the EU where we have 11
9 official languages, and it contributes wonderfully to
10 the cultural richness of the organization and also to
11 the cost of translation and efficiency.

12 So, what we've done in this regard is we've
13 recently had a stakeholders meeting with leading
14 figures from business, the consumer side and policy, to
15 sit down and open a dialogue in what we would call a
16 co-regulation process. This is a new approach within
17 Europe to try and build from the stakeholders who will
18 be affected and who will be operating these policies
19 light -- not binding regulatory frameworks but policies
20 which will get the benefit of the endorsement, the
21 light, nonbinding endorsement of bodies like the
22 European Commission and Parliament and so forth, to set
23 out policies which they can take ownership of and
24 implement and deliver.

25 And to that end, in fact, we had our first

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1 meeting yesterday of our stakeholders group, that core
2 group, who will be reporting back in a larger
3 eConfidence forum, where there will be a website and
4 regular information, working on the issue of codes of
5 conduct -- in other words, what kind of floor or
6 principles can we agree on. When I talk about the
7 stakeholders, many of them will be global players, so
8 we're hoping there will be osmosis between both sides
9 of the Atlantic on these issues.

10 Do we need to look at things like recognition
11 factors? Is there any utility in, for example,
12 incorporating recognizable logos into trustmarks which
13 fulfill these codes of conduct which are going to be
14 set out on a general level? The codes of conduct, of
15 course, will not replace individual schemes. They will
16 simply set general principles which will allow the
17 stakeholder community to develop these issues.

18 And then how are these things to be enforced?
19 Much of what's out there in codes of conduct and trust
20 marks, about 70 percent I would guess is fairly shared
21 by most people, the basic values, transparency and so
22 forth, but how do you actually, if you are as
23 organizations going create something like this, a new
24 context in which our business can flourish and benefit,
25 how do you police it?

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1 If the public authority's role is mainly to
2 facilitate in the case of Europe -- we do not, by the
3 way, have the enforcement powers yet of the FTC in
4 these matters, we have a different approach to
5 things -- how will the business and consumer community
6 police these things to make sure that people who are
7 members and so forth and come up to the standards, how
8 will this be done across borders? Is there a need for
9 new kinds of institutions, nationally, at a regional
10 level in Europe or globally? These are all questions
11 which will be addressed in the course of this
12 eConfidence stakeholder group.

13 And I would invite you, our website will be up
14 and running in about two to three weeks time, called
15 the eConfidence Forum, and to participate in this
16 discussion, you are most welcome, because as I say,
17 there is no such thing as a backyard anymore, and we
18 are all in each others' backyards when it comes to the
19 new society.

20 So, we have the three-point approach. We have
21 the legal safety net. We have the confidence-building
22 measures of charge-back, of -- in which we are at an
23 early stage of our discussions with the credit card
24 companies, with codes of conduct, with trust marks, and
25 then we have the ADR dimension. And the ADR dimension,

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1 we have a recommendation, again, which is nonbinding,
2 which sells the intentions of the Commission to work
3 constructively in this way, has been set out in a
4 recommendation which is available to you in the
5 documentation for the workshop.

6 What we've done to follow on from that
7 recommendation is to set up a new network called
8 European Extrajudicial Network, and this is basically
9 that in each of our member states, you will have a
10 clearinghouse through which any consumer can approach
11 and raise the issue which they have in terms of a
12 transaction which has taken place from one country to
13 another, and this network of clearinghouses will then
14 liaise with the individual sectoral or national ADR
15 bodies of what whatever type that exist in those
16 countries.

17 It is a small, modest first step to try and
18 create not a heavy top-down approach but a networked
19 approach to try and resolve these issues, and we would
20 be providing funding in this regard also to try to
21 crack the nut of language and other types of
22 difficulties. This process was launched recently in
23 Lisbon in May.

24 On top of this, we're funding pilot projects,
25 and in particular a pilot project called Ecodure, which

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1 is an attempt to look at the issues of having a
2 cybertribunal or an online tribunal within the European
3 Union which would be capable of dealing with these
4 issues using less cumbersome and difficult rules and
5 procedures than are currently in place. So, there's
6 much going on. There's a ferment of ideas. There's a
7 whole host and battery of issues that need to be
8 addressed, but the only way we are going to address
9 them is working in a consensual way and setting up a
10 new landscape and trying to work to find a context in
11 which both within individual countries, within regions
12 and between trading partners, both bilaterally and
13 multilaterally, we can actually create the new economy
14 serving a new society for a new world.

15 And as they say, we hope that in the language
16 of Jaws, we can then convince our consumers that it's
17 safe to get into the water.

18 Thank you very much.

19 MR. STEVENSON: Thank you very much for those
20 remarks.

21 We will now turn to the discussion on this
22 subject of incentives, which I think follows very well
23 on that as a start. Let me just go through and
24 introduce the panel we have here.

25 We have right next to me hear Anne Carblanc,

1 from the OECD, the principal administrator with the
2 Working Party on information security and privacy.
3 Next to her, Roger Cochetti, senior vice president and
4 chief policy officer at Network Solutions.

5 Then Nancy Ellis, founder of WEBDispute.com,
6 and -- let's see, we're out of order, because you're
7 Jill Lesser, I know that, vice president for domestic
8 public policy with AOL, and then Peter Harter, vice
9 president for global public policy and standards at
10 eMusic.com.

11 Then we have Colin Rule, general manager of
12 MIRC Online Mediators, Mediate.com, and Frank Torres,
13 who is legislative counsel at Consumers Union. Mike
14 Wheeler, professor at the Harvard Business School, and
15 Yuko Yasunaga, deputy director, commerce policy
16 division at the Ministry of International Trade and
17 Industry in Japan, also known as MITI.

18 Thank you all for joining us.

19 I thought we might start with the questions --
20 oh, we are going to just pause for a moment. No, the
21 trouble is not in your set.

22 Okay, out of the huddle. To start with the
23 question, what are the incentives and disincentives for
24 business to participate in developing ADR, and I
25 thought to start things off, I might turn to Roger to

1 ask that question, and as I mentioned, he's at Network
2 Solutions now and before that had been with IBM and is
3 certainly familiar with some of these -- the incentive
4 issues that come up.

5 MR. COCHETTI: Thank you, and let me explain,
6 if I may, at first that I'm -- while I'm pleased and
7 proud to be here on behalf of Network Solutions, I'm
8 also here today representing a group of companies that
9 includes America Online, AT&T, Dell, IBM, Microsoft,
10 Network Solutions and Time Warner. This group of
11 companies came together almost a year ago now to
12 address many of the issues that this conference has
13 been looking at, and the underlying issue, of course,
14 is one of confidence in consumer shopping on the web.

15 The group looked at this question from both the
16 point of view of consumers and the point of view of
17 merchants and concluded that there were very important
18 inhibitions to the kind of confidence that we would all
19 like to see that were beginning to emerge. Those
20 inhibitions, while not too evident today, had the
21 potential as time goes on to retard the growth of
22 electronic commerce as consumers and merchants both
23 could be hesitant to engage in further consumer
24 e-commerce, and we decided to tackle both of them.

25 And the reason we did really sort of speaks to

1 the question you've raised, and that is what are
2 incentives? The incentives are to deal -- the
3 incentives that merchants have are to deal with the
4 inhibitions that both they and consumers could have for
5 e-commerce, and in dealing with them, the role of ADR I
6 think becomes a lot more clear.

7 From a consumer point of view, one of the
8 issues that's beginning to emerge is the question of
9 under whose rules does the merchant operate when I go
10 shopping on the web? In other words, if I, in the
11 location where I live, know that my jurisdiction has a
12 return policy of such and such or an advertising policy
13 of such and such or a disclosure policy of such and
14 such, when I go shopping on the web, how do I know if
15 the merchant plays by the same rules that I'm used to
16 at the corner store?

17 Conversely, the issue for the merchant is if
18 I'm a good merchant, as we know most are, what I want
19 to do is comply with the laws and the rules that apply
20 to me in the territory where I operate, but if I'm
21 selling to consumers who live in 180 different
22 countries or, arguably, 4000 different local
23 jurisdictions, how do I know what rules the local
24 authorities there are expecting me to adhere to?

25 In both cases, what we have are uncertainties

1 that can inhibit the growth of e-commerce, and solving
2 those uncertainties is a major incentive for the
3 e-business community. ADR, we discovered, plays an
4 important role in the solutions on both sides. We
5 announced this morning the first step in dealing with
6 what we felt were consumer inhibitions by putting
7 forward a code of conduct, a best practices statement,
8 for web merchants. Copies of that are available on the
9 desk in the lobby.

10 This is a first step at identifying what would
11 be a global or a universal set of best practices
12 statements as seen by merchants for conduct on the web
13 with regard to consumers. In it, ADR plays a very
14 important role, because ADR can be and is a critical
15 element in consumer confidence, in showing to consumers
16 that merchants are serious about a code of conduct or
17 about a best industry practices.

18 On the other side, we also have issued a
19 statement on jurisdiction, which is intended to give
20 merchants some satisfaction that the riddle of whose
21 rules I should adhere to or comply with can be
22 addressed and there are ways that we can make progress
23 on that, and in there ADR plays a similarly important
24 role, because what it does is create a vehicle through
25 which some of the pressure of defining jurisdiction can

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1 be relieved by providing a route for consumers to
2 address their complaints without having to go to
3 jurisdictions or litigation.

4 So, ADR plays an important role in what I think
5 is the biggest single motivation of e-business, and
6 that is addressing the uncertainties that arise because
7 of the cross-border nature of the media.

8 MR. STEVENSON: Okay. Roger, just to follow up
9 on that, could you just describe for us -- I know, I
10 think you all had put out some papers this morning, but
11 what the ADR component of this plan or proposal says,
12 if you could describe that part of it for us.

13 MR. COCHETTI: I'd be happy to, but I guess
14 what I'd say is, again, looking at the best practices
15 statement, it is not our intent that this be viewed as
16 the last word on this subject but rather the first
17 word. What we're trying to do is begin a dialogue, and
18 we are encouraging and expecting comments from
19 merchants who didn't participate in this development
20 process, as well as consumers, governments and others.

21 So, the fact that there are open pieces of it
22 is not either the result of our ignoring it or giving a
23 short rift to it, but rather, part of our intent is to
24 open a dialogue on it, but what we attempted to do was
25 first recognize that from the point of view of best

1 practices, it is important that web merchants have
2 dispute resolution mechanisms, both dispute resolution
3 mechanisms that are entirely internal and dispute
4 resolution mechanisms that rely on third parties, that
5 the use of third parties can be very valuable, because
6 it generates consumer confidence, and it creates a
7 process that everyone can recognize, including
8 governments can recognize, as having greater legitimacy
9 than purely or only an internal process.

10 I think we've -- without trying to be too
11 precise about it, and it wasn't our purpose to be
12 precise, what we've done is encourage merchants to
13 explore that template and to develop practices and
14 approaches and use existing practices and approaches
15 that fit it. So, I guess the answer is we've clearly
16 come out in support of merchants using dispute
17 resolution mechanisms, and we've also indicated that
18 where these mechanisms are available, consumers should
19 use them, at least as a first recourse if they have a
20 concern or a complaint with the merchant, and none of
21 this, of course, should in any way undermine legal
22 rights that either merchants or consumers would have.

23 MR. STEVENSON: Okay. If I could turn next to
24 Professor Wheeler, if we could get your take, and
25 again, focusing first on the business incentives that

1 are involved here, and then we will turn to the
2 consumer and other incentives.

3 MR. WHEELER: Thank you, and thank you
4 generally for the invitation to take part.

5 If you look at the question that's been posed,
6 it says what are the reasons for industry and others to
7 participate or not participate in developing ADR, and I
8 think that that expresses a conundrum of sorts, because
9 it's hard to see that consumers are going to develop
10 ADR systems. It's possible that various agencies of
11 government might, but this is going to happen if and
12 only if there is business support for it.

13 But as was just commented, it's an alternative
14 not just to litigation, which may be the rare case, but
15 an alternative to internal resolution of problems
16 through traditional customer support processes. So, I
17 think there are two aspects of this question. One is,
18 under what circumstances would merchants and others
19 find it advantageous to look to so-called third
20 parties, to impartial parties, for resolutions of
21 disputes rather than trying to resolve them, and so I
22 think we got a clue to that this morning with the early
23 statistics about the costliness of losing customers and
24 the nice bounce-back when disputes are resolved
25 constructively.

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1 There is, however, I think another side of the
2 coin that's not really expressed in the question here.
3 We have industry, consumers and governments, but the
4 question is silent as to the providers, and some of
5 that is I gather the province of tomorrow's
6 hypotheticals, and I don't want to get into territory
7 that we don't want to get into, but at some point when
8 we think about incentives for business to be involved,
9 it seems to me very hard to answer that question unless
10 we know what the arrangement is with the providers.

11 Beyond doing good works, what are the rewards
12 for providers? What's the business model for them? To
13 what degree are merchants willing in the name broadly
14 of consumer satisfaction to invest rather heavily in
15 the resolution of specific disputes? And I think
16 that's still a question.

17 We see pioneering businesses demonstrated this
18 morning that are out there doing different forms of
19 dispute resolution, and they may show great promise,
20 but we're very, very new in this field, and what's
21 sustainable and what is not I think is open to
22 question. So, if I go back 10 or 20 years and think
23 about dispute resolution broadly, the adage was there
24 were plenty of dispute solvers looking for business and
25 plenty of dispute havers who didn't know what dispute

1 resolution was, and the question was what was the
2 linkage, particularly where we often had parties with
3 different resources?

4 So, I would just like to put on the table for
5 now or for later discussion that to talk intelligently
6 about industry, consumers and governments, we really
7 need to imagine the different business models that
8 providers might have to see what's attractive and
9 what's less attractive for those parties.

10 MR. STEVENSON: Okay, that's a helpful comment.
11 I also hadn't said, but if people would like to respond
12 to a comment that someone else has made, if you could
13 just put your tent up like this, and we will note that
14 you would like to respond to that particular comment.

15 Maybe following up on that last point, though,
16 I could ask Colin Rule to talk about what the
17 incentives are from the ADR provider's point of view.

18 MR. RULE: Sure. Well, I must say I'm glad
19 Professor Wheeler has stepped out and suggested that we
20 talk about incentives for providers, because as a
21 provider, I'm quite concerned with my incentives in
22 this niche, but I feel -- at Online Mediators, we
23 launched January 1st of this year, we have processed a
24 good number of disputes through lots of different
25 channels. We are in the process of helping both

1 consumers and businesses visualize why online dispute
2 resolution makes sense for them in their business
3 contexts and their e-commerce relationships.

4 I think in the dispute resolution field, I've
5 been part of the dispute resolution field for the last
6 decade, but there are many people who have been working
7 on these same questions in the face-to-face environment
8 for 20-30 years, and we've confronted a serious
9 challenge in educating consumers of dispute resolution
10 services and businesses as to why this makes sense for
11 them to devote time and effort and resources to
12 building these types of institutions into their
13 commerce practices.

14 So, organizations like the Center for Public
15 Resources have made great headway in getting
16 commitments from businesses to write clauses into their
17 contracts that use dispute resolution, or even
18 day-to-day, you know, grass roots mediators have
19 educated consumers and just community dispute
20 resolution programs have helped people learn why
21 dispute resolution makes sense for them.

22 So, I think the main challenge in getting these
23 incentives clarified is really an education process.
24 It's making people aware of the resources that are
25 available to them, and especially in the online dispute

1 resolution context, as we've developed new services,
2 innovative services, getting the word out about those
3 services is a large part of connecting this fully
4 formed need that businesses and consumers know they
5 have in their e-commerce relationships and connecting
6 them with the resources that dispute resolution service
7 providers offer.

8 So, I hope that connects well with what Mike
9 said.

10 MR. STEVENSON: Okay, thank you. From the
11 point of view of perhaps a different kind of -- AOL is
12 a in a different kind of position as a provider than
13 maybe some businesses, and how does the -- how do the
14 incentives work for AOL? I know that from earlier
15 conversations we have had on this subject that AOL has
16 been interested in this, but there are kind of the pros
17 of cons of being involved, and I thought, Jill, it
18 might be helpful if you could walk us through that.

19 MS. LESSER: Yeah, sure.

20 Just as a little bit of background, to give you
21 sort of an idea of where our incentives lie, I've been
22 at the company about four years, and when I got there,
23 we had as a total of sort of within the AOL environment
24 zero e-commerce revenue. So, we're looking at an
25 enormous increase in a very short period of time, but

1 we've clearly had incentives I would say in two
2 buckets.

3 The first is -- and we heard Mr. Bell talk a
4 little bit about the incentives of trust. We felt as
5 an online merchant certainly but more probably
6 analogous to an online mall, where we're providing a
7 forum for merchants, some of them very small, very new,
8 not offline brands who are easily recognized or trusted
9 at all, to essentially build their business in an
10 online environment, where we, as America Online,
11 provided some level of interface with the consumer and
12 therefore some level of trust, how would we then carry
13 that trust we had gained as an ISP, as a provider of
14 chat and e-mail and those kind of functionalities, into
15 being an online merchant provider or an e-commerce
16 provider?

17 And I think our incentives were very clear from
18 the git-go, and, in fact, I would say interestingly
19 many of our policies do emanate, whether it's from the
20 legal department or from my department, the policy
21 department, the program we've instituted in this area
22 actually came directly out of the business side, which
23 basically says, you know, the business people who are
24 in charge of delivering e-commerce revenue on America
25 Online saw very early and very quickly that they needed

1 to provide some sort of a -- well, both alternative
2 dispute resolution, but in many ways, building off what
3 Roger said, a best practices mechanism, which is geared
4 more towards what I would call dispute avoidance than
5 it is dispute resolution.

6 So, we have, just to briefly describe what
7 we've done, and it works in our environment, and I
8 think it is maybe a model for both internal and
9 external purposes from a merchant perspective. We have
10 a certified merchant program that protects consumers
11 both within the AOL proprietary environment, i.e., if
12 you're a \$21.95 a month AOL customer, and those who use
13 our online mall through AOL.com, which is available to
14 anybody going there on the web, so it is not a
15 subscription-based service.

16 We have hundreds of merchants who are part of
17 that program, and we focus on basically what I would
18 say are three areas. One is providing total
19 satisfaction, and that means that our merchants will
20 make sure they have certain return policies, shipping
21 policies, advertising policies, privacy policies, in
22 order to be a merchant within the AOL environment.

23 Second of all, we will say to the consumer that
24 we will protect you, so we know most of those
25 transactions currently are being done with credit

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1 cards. I do agree, as the earlier panel stated, the
2 debit card issue is a more complicated issue. With
3 credit cards, we will make the consumer whole. So,
4 many credit card companies compensate only up to, you
5 know, up to a loss of \$50, we would basically then
6 compensate the consumer for the rest of that \$50 loss,
7 which I think provides them with an extra degree of
8 security and sort of articulates the extra AOL
9 commitment if you shop within that mall.

10 And then finally, and we have identified this
11 as perhaps the greatest cause of concern for consumers
12 in building trust and actually shopping online, and
13 that is security, you know, what can you say about what
14 happens to my credit card when I push the "send"
15 button, and is it actually going to this merchant, and
16 can I trust this merchant?

17 One thing we can do as an online mall, and I
18 think it is similar to what a third-party ADR provider
19 might be able to do, is to provide that branded trust
20 to the consumer when the brand itself, the merchant
21 brand itself, is not yet big enough or well known
22 enough to do that. And it also allows us to make clear
23 -- you know, clearly for our consumers, from an AOL
24 branding perspective, that we offer an extra level of
25 security.

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1 So, we have never found, interestingly enough,
2 any disincentives to doing this program or anything
3 like it, whether it's participating in an industrywide
4 discussion or providing as a benefit to our members and
5 our users a certified merchant program as a "mall"
6 operator. Any disincentives to doing it, the
7 incentives are all -- because we see the medium clearly
8 is still going like this (indicating). Maybe perhaps
9 when it starts to level off, some of those incentives
10 will change, but if you're building something from the
11 ground up, it's clear you have to sort of put a foot
12 forward that you may otherwise not have to in the
13 offline world.

14 MR. STEVENSON: Okay. To follow up on
15 something Roger said when he was talking about both
16 sort of industry incentives and also consumer
17 incentives, so we got a little perspective on
18 industry's take on consumer incentives, so I think I'd
19 like to ask Frank Torres to give us a consumer group's
20 take on industry incentives, and we've heard from a
21 number of people here what some of the incentives are,
22 and I wondered what -- if there are other issues that
23 we should identify as important motivations.

24 MR. TORRES: Well, I think there's a number of
25 incentives for consumers, but they can also turn

1 quickly into disincentives if not handled in the right
2 way, I think. To take a step back, if what we're
3 primarily talking about is a buyer and a seller working
4 in the online environment where, say, a product is
5 purchased, and the buyer and seller could be anywhere
6 globally, hopefully everything goes well with that
7 transaction and the consumer gets the product and is
8 happy. What we're talking about is what happens when
9 the consumer gets the product and is not happy, and how
10 does the consumer go about resolving that?

11 If the consumer doesn't get the product and
12 there's some problems with the charges and the consumer
13 uses his or her credit card and you're here in the
14 United States, you're protected by law. Your liability
15 is limited, you have got the charge-back mechanisms.
16 If you get a product that doesn't meet what you thought
17 it was, the FTC might get involved, there might be some
18 warranty questions there, and there are ways to resolve
19 that.

20 What happens when all of that kind of fails and
21 everything falls through the cracks and, you know, how
22 do we use a safety net, and I think what people are
23 talking about here is using ADR as the safety net
24 before you get to the judicial system. So, from a
25 consumer perspective, there's a couple of things.

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1 One, is what we're talking about in terms of
2 online ADR better than the system that we have today,
3 not just the system in the offline world, but the
4 current system that's available to consumers in the
5 online world, as well? Certainly there's some benefit,
6 I think, there, because the seller could be anywhere,
7 and if we get sellers abroad to kind of buy into the
8 system, then the consumer can go shopping hopefully
9 with confidence, that, you know, no matter who they do
10 business with, that there's kind of a baseline of way
11 to resolve disputes.

12 The second way a consumer could benefit is if
13 the dispute is actually resolved in a fair, unbiased,
14 relatively cheap and efficient manner. You know, many
15 consumers today might not go after that \$25 widget that
16 they bought down at the corner store that now all of a
17 sudden broke after the first time the consumer used it,
18 but it's a pain to get into the car, drive down to the
19 store, you've got to find the receipt and do all that.

20 Well, if we can figure out a way maybe to help
21 consumers who are purchasing maybe not that \$25 online
22 but maybe the \$100 online, where before they might have
23 let it slide, to actually provide them with a mechanism
24 to make sure that they got a fair deal, that if the
25 product broke, then they can resolve that issue quickly

1 and easily, then that might be a good thing, a good use
2 of the technology.

3 The third thing is kind of the ease of use, how
4 easy will this system be for the consumer to use? Is
5 it going to take 24 hours to resolve, 48 hours to
6 resolve? I don't think what we're talking about here
7 and what we shouldn't be talking about is using this
8 whole forum as an excuse for some sort of back-handed
9 tort reform effort, and I would hope that wouldn't be
10 the case. So, ease of use is big.

11 And then I enjoyed some of the comments earlier
12 about how maybe what we're really talking about, too,
13 is a competition issue, that we're moving beyond -- if
14 consumers are concerned about their privacy online,
15 about security online, about how to resolve their
16 disputes and what they look for in the brand online is,
17 you know, this is a reliable company, you know,
18 Nordtrom Online, if they mess up, they are going to
19 make me whole very quickly.

20 Well, if we come up with a framework that
21 applies to all of the ADR providers, a framework that
22 encompasses all the businesses doing business online,
23 then what you have done is level the playing field.
24 So, it doesn't matter who you are online, if this
25 system applies to you, then it doesn't matter if you're

1 Nordtrom or the mom and pop store, you know, in India,
2 that -- of course, this is probably pie in the sky, but
3 I think you get my point, that all of a sudden
4 everybody is on equal footing, and the consumer can go
5 online and shop with confidence, which brings
6 competition into it, and, of course, competition is
7 good for consumers, brings down prices, hopefully
8 brings up quality.

9 So, with that I'll stop, but just to -- real
10 fast, in response to the announcement today by the
11 group of companies, you know, on the whole, when you
12 read through the principles, they're very good in the
13 sense that they lay out what merchants should be doing,
14 not just online merchants, but merchants everywhere. I
15 mean, unfortunately, I think it's a shame that we've
16 got to put down on paper guidelines that merchants
17 shouldn't engage in deceptive or misleading practices,
18 but I think that's the realities of the marketplace
19 today, that, you know, things like that have to be
20 spelled out.

21 What we would like to see, perhaps just some
22 more details, and I was very encouraged to hear, you
23 know, that this was the beginning of the discussion,
24 and I'm glad to see and I always enjoy working with
25 companies who are trying to do the right thing, and I

1 think we're all struggling with how to make this
2 e-commerce business work. So, I applaud those efforts
3 and look forward to working with that group.

4 MR. STEVENSON: Okay, one of the things that
5 Frank mentioned there was the concern about what he
6 called back-handed tort reform, and I wondered if
7 anyone had a reaction. Is that a legitimate concern
8 for people to have or how should that be looked at in
9 this consumer context?

10 MR. COCHETTI: I'll comment briefly on the same
11 point that I made earlier, which is that our initiative
12 was not an effort to find a back door to tort reform;
13 however, it is important to understand that from the
14 point of view of any merchant, large or small, who goes
15 on the web, there is a very important issue that they
16 face, and that is good merchants want to comply with
17 applicable rules, and they don't necessarily want to
18 comply with every theoretical rule but applicable
19 rules, and that's common sense.

20 The good merchant who's trying to comply with
21 the rules that are applicable can find itself in a
22 situation where there are dozen or hundreds or even
23 thousands of jurisdictions who assert that their rules
24 are the applicable rules, and what is a good merchant
25 supposed to do under circumstances like that?

1 So, I think it's important to recognize that
2 merchants who are dedicated to best practices have
3 issues that need to be addressed, as well, and I
4 wouldn't describe that as a back door to tort reform as
5 much as I would the fact that if we're going to see a
6 continued growth of e-commerce, we have to recognize
7 the inhibitions that arise on the consumer side, which
8 is their uncertainty of what rules apply, as well as on
9 the merchant side, which is their uncertainty as to
10 which rules apply.

11 MR. STEVENSON: Okay. Yes, Frank.

12 MR. TORRES: It's interesting when we talk
13 about electronic commerce issues, on the one hand, some
14 people try to compare it to what happens in the real
15 world, and then some people back off and say that it's
16 completely different, it's a new economy, we have got
17 to treat it differently.

18 I would -- in thinking about this, you know, I
19 understand that kind of the global implications about
20 e-commerce, anybody with a laptop in any business
21 anywhere in the world can do business together and
22 order products and whatnot, but in the real world, we
23 do have a situation where there are people who market
24 their products all across this country, if we just kind
25 of limit it to the United States, and they sell their

1 products in many different jurisdictions across the
2 country, and I know people complain about local
3 ordinances and -- but kind of businesses survived in
4 this country, and I wonder how that type of framework
5 is that much different than the framework that we have
6 now.

7 I mean, granted, there's differences when we
8 get into the international setting, but we still have a
9 system in this country where if I want to market a
10 children's toy and I want to put it in stores in all 50
11 states and territories, I mean, I can do that, and
12 companies do do that, and they don't seem -- some
13 companies don't seem to have a difficulty in doing
14 that. So, how is that so much different, again
15 recognizing the difference between -- in the global
16 marketplace, where the laws in China might be different
17 than the laws here, but still companies manage to
18 thrive and survive given the current framework.

19 MR. STEVENSON: Peter Harter, why don't we turn
20 to you, get a perspective from the smaller business.
21 How do those incentive issues look to you?

22 MR. HARTER: It's a pleasure to be here.
23 eMusic is two and a half years old, so we're not as
24 young as we used to be and we're not as small as we
25 used to be, about 200 people. We grew last year by

1 acquiring four different companies in a year's time, so
2 in a very short period of time, we've become the
3 largest retailer of online music. We download music
4 from our website, and we actually make money doing
5 that, despite all the talk about Napster (phonetic) and
6 Nutella (phonetic) and piracy, which is very amusing,
7 because there are no business models behind those
8 piracy service providers.

9 I think we have a lot of challenges in the
10 online media industry, what happens in music, what
11 happens for digital books and digital movies, and for
12 us to have any kind of competitive edge, our consumers
13 are the fundamental of our business, because if they
14 don't have a satisfactory experience downloading music
15 from our site and paying for it, they can obviously try
16 and find pirate copies out there on internet.

17 And I think what I can bring to this
18 conversation this afternoon is the incentives for
19 companies to have very good customer relations to give
20 them that competitive edge. They spend less time
21 litigating or just simply losing money to piracy,
22 because if you make it too difficult for consumers to
23 get to your product, they'll simply go elsewhere on the
24 black market. Supply and demand, simple as that.

25 Our business philosophy at eMusic is to make it

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1 as inexpensive and fun and convenient as possible to
2 buy music legally from our website and download it and
3 possess it, and we have to compete with free music,
4 whether it's free legal music that's given away to
5 promote other items or worse, pirated music, which is
6 free of charge. It's not free to get. You have to
7 have a pretty good computer, a high-speed connection to
8 download it over and probably higher than average level
9 of computer skills to manipulate software programs like
10 Napster and Nutella that are out there. So, pirated
11 music is not completely free.

12 It's not the entire population that can do it.
13 It's not the average user who can do it. So, the
14 philosophy at eMusic is that to incentivise the
15 consumer to come back and to buy more music, what we do
16 is if, say, your computer crashes -- of course, that
17 never happens, a computer never crashes these days --
18 and your hard drive, your library of all that digital
19 music files is wiped out, or your computer's stolen, a
20 variety of things happen, computers are not perfect
21 devices.

22 We have a profile of what you bought, because
23 you bought everything through credit cards, and we
24 maintain that, we have a privacy policy, we have a
25 secure database that's protected, no one else has

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1 access to that profile of what you bought, and we will
2 simply give the music to you again, new copies, at no
3 charge.

4 MR. STEVENSON: In that connection, Peter, do
5 you find -- I think people have mentioned ADR as sort
6 of a cure for some problems but also as sort of a
7 preventative measure, and in the experience of your
8 particular company, is it something you think there's
9 an incentive to have in order to use, and to what
10 extent is it to have in order to reassure people that
11 it might be there if somebody has a problem?

12 MR. HARTER: I don't see any use for ADR in our
13 business model at this point in time. It's far easier
14 for us -- when you charge 99 cents per song or \$8.99
15 an album, it's far easier for us and for the consumer
16 to resolve any dispute or concern the consumer has to
17 simply give them the music again, and we eat the cost
18 of paying the royalties to the rights holders, because
19 it is a new copy. Under copyright law, we are
20 obligated to pay that over again.

21 It's different than you go to a record store
22 and you buy a CD and the CD is stolen, you can't go
23 back to Virgin Mega Store in your town and get a new
24 free copy. You have to pay for it again. Again,
25 there's that competitive edge.

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1 When the price of the product is so small, the
2 cost of administrating ADR seems to be not worth the
3 effort, when we're more interested in retaining
4 customers and not -- you know, make them come back and
5 buy more music, tell their friends to come buy more
6 music, and that's how we managed to grow the business
7 in this very challenging business environment.

8 MR. STEVENSON: If I could follow up on a
9 question that I know people have raised in at least
10 some contexts, and obviously different businesses have
11 different business models affecting what kind of
12 disputes they deal with, but the question has been
13 asked, if good businesses take care of their consumers,
14 and maybe they don't need ADR, and if really bad
15 businesses blow off ADR, what role can ADR play? Is
16 there anything to that concern? Is that -- I mean,
17 what -- how does one sort of see stuff falling in the
18 middle? How would people respond to that?

19 MR. HARTER: Well, taking some lessons from
20 piracy, you're never going to eliminate 100 percent of
21 a bad thing, whether it's credit card fraud or piracy
22 of music or software. You are never going to make
23 people drive at the speed limit 100 percent of the
24 time, so I think you have to look as a businessperson
25 at your own company, and then at the most ideal

1 business environment you want your company and your
2 market to function in.

3 You have to say, all right, we can live with X
4 percent of the problem or such and such loss of revenue
5 across the industry and let the industry swallow it and
6 pass it along in aggregate to the consumer.

7 Now, when it comes to consumers not having a
8 good experience and then being exploited in some
9 negative way by businesses and they have no recourse,
10 I'm not sure that's exactly analogous to credit card
11 fraud or to piracy or other issues businesses face in
12 their customer relations, but I do think that if enough
13 companies that have good customer relations and those
14 that need to resolve disputes through ADR where the
15 transaction is buying a car online, where you can't
16 simply download another car, where there's a lot of
17 money at stake, I think it's not an absolute solution
18 for all companies.

19 And we do have to look at that administrative
20 cost, and maybe some of these startups aren't driving
21 down the administrative costs, but I have to tell you,
22 coming from the small business point of view, asking
23 small companies, and this can be a bit of heresy I
24 know, but for what it's worth, it is very hard to get
25 small companies to get engaged in politics and public

1 policy, and whether it's getting them to put a privacy
2 statement on their website, to have good privacy
3 practices in their business activities, let alone put
4 up an ADR program, I think is very much challenging for
5 the business people running those startups.

6 I mean, these business people are people out of
7 high school and college who start these companies in
8 their garages. These are not seasoned managers, and
9 they have a steep learning curve when it comes to these
10 kinds of where politics meets technology issues.

11 MR. STEVENSON: Thank you.

12 Nancy Ellis, if I could ask you about your
13 reaction to the questions about what role ADR really
14 can play in these kinds of transactions. Is there
15 really a motivation to use that for a lot of businesses
16 in your view?

17 MS. ELLIS: Well, just to give you some
18 background on who I am, I started a small web-based
19 dispute resolution company a couple months back,
20 WEBDispute.com really to focus on -- I guess as many of
21 you in the audience, you look at the proliferation of
22 e-commerce on one side, and on the other side, clearly
23 you can say that there is no sort of mechanism out
24 there for resolving disputes.

25 But on the other hand, my background, my main

1 background is that I have served as a consumer advocate
2 for years. I've worked as an arbitrator for the Better
3 Business Bureau since 1987, I've worked as a consumer
4 arbitrator for the American Arbitration Association,
5 and even when I designed and developed WEBDispute.com,
6 one of the main focuses of my model was really on
7 B-to-B transactions rather than B-to-C, precisely for
8 the reason that Peter Harter just mentioned.

9 I mean, these cases and the cases that I've
10 done over the years with the Better Business Bureau are
11 tremendously labor-intensive. When I hear a dispute --
12 I mean, even if it's a case where a person is concerned
13 over a \$75 or \$100 item, it's their \$75, it's their
14 \$100, and they want to have justice. Often times the
15 cases can become very emotional.

16 Another thing that I found kind of being in the
17 trenches of the consumer arbitrator arena is that there
18 tends to be a very definite lack of knowledge and
19 awareness. This morning we had a wonderful
20 presentation where we went through -- I guess Professor
21 Izumi went through and talked about all the different
22 mechanisms of dispute resolution, yet if we went
23 outside on Constitution Avenue and we questioned, you
24 know, passers-by on what is the difference between
25 mediation and arbitration and med/arb, I would venture

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1 to say that 90 percent of the people would be clueless.

2 And I really think that as aware individuals,
3 as consumer advocates, we have to make some sort of
4 strides with regard to knowledge and informing
5 consumers on what is this process all about. I think
6 for a lot of companies out there, they have to realize
7 that this is a tremendously big undertaking when you
8 take on consumer issues and consumer arbitration or
9 mediation or ADR issues.

10 You know, this morning we went into a
11 discussion of the woman with the chair who had a
12 discrepancy with her chair. I guess SquareTrade
13 presented that, and my question is, you know, what
14 would happen if -- in that case it was successfully
15 resolved, okay.

16 We didn't ask the question of how many hours or
17 how many labor hours or man-hours that would take to
18 get to the point of resolution, but my other question
19 is, what happens if that case was not resolved, if the
20 woman were not awarded the \$100? You know, at that
21 point, then where do you go in the web arena? There is
22 really nothing.

23 I mean, I've thought about this a great deal.
24 I mean, maybe the solution is to have, rather than an
25 iCourthouse, you know, a new federal circuit court, a

1 cybercourt. Maybe that's what we really need. You
2 know, I think that brings parties together, proximity
3 issues can be taken care of that way.

4 Anyway, did I answer your question? I don't
5 know. I might went a little off track there.

6 MR. STEVENSON: The answer was better than my
7 question.

8 Why don't we turn now to Mr. Yasunaga to get
9 his thoughts. Mr. Yasunaga participated in the OECD
10 guidelines project and I think has perspective both
11 from that experience and from his experience in Japan.

12 MR. YASUNAGA: Thank you very much.

13 I would like to share a common view expressed
14 by this membership that ADR is good educational process
15 and also ADR is good safety net. On behalf of the
16 Japanese Government, we would like to agree, totally
17 agree with these views.

18 We think that the biggest problem of the
19 current online market is the lack of the community's
20 common sense to walk around the cybermarket. As you
21 may know, also in Japan the size of the B-to-C
22 electronic commerce market has increased by four times
23 the early 1998 to '99, a very rapid growth; however,
24 many consumers have felt uncomfortable feeling in
25 online transactions.

1 Japan is one of the countries where ADR with
2 regard to consumer transactions is less developed.
3 Currently available ADR system is only complaints-
4 handling mechanism accommodated with online trust
5 mechanism, which only provides consultation and
6 sometimes informal conciliation, but no mediation nor
7 arbitration due to the legislative limitation.

8 Of course, there are some areas also in Japan
9 where ADR is actively used, such as traffic accident
10 and the real estate troubles, but not so actively used
11 for consumer issues.

12 The consumers' uncomfortableness I said earlier
13 is coming not only from concerns of privacy, security
14 in transmitting credit card number online, but also
15 from the fact that there is little opportunity to
16 resolve disputes in a predictable manner.
17 Predictability is key for consumer issues. It is our
18 idea.

19 On the other hand, if you look at the business
20 side, business side, especially small and medium
21 enterprise, also feels strong needs for the system to
22 resolve dispute swiftly, cost effectively and without
23 any burden of legal process. So that the Japanese
24 Government would like to share the same opinions that
25 the ADR system will work as good safety net in the

1 online market.

2 Of course, the government's point of view --
3 from government's point of view, there are many
4 interests, such as easy accessibility, available or
5 affordable cost possible, swift ADR process possible
6 and so on, but maybe fully disclosed information from
7 business or ADR body would resolve this issue. So,
8 consumer may choose the most appropriate ADR measure
9 based on those fully disclosed information.

10 But the neutrality and the fairness or
11 equitability will be raising some questions or tasks
12 both for private bodies and for government. This is my
13 personal idea, but forgetting very neutral and very
14 fair and very equitable ADR process, government will
15 have to work with private society and with consumer by
16 setting appropriate guidelines or as a type of
17 activity.

18 And so, in the -- finally, Japanese
19 governments, the great expectation on online ADR is
20 that if ADR system work well and the experiences
21 accumulates, that experiences can be a good source for
22 a new rule in the cybercommunity. As I said in the
23 first part, the biggest problem in today's online
24 market is a lack of community's common sense, but the
25 experiences can be generating the kind of common sense

1 relatively in a short time. So, this is the biggest
2 expectation of us.

3 Thank you very much.

4 MR. STEVENSON: Thank you.

5 I would like to turn now to Anne Carblanc to
6 comment a little bit on her experience in the OECD,
7 what she sees as both the government and the consumer
8 incentives, in particular, in participating in this
9 process.

10 MS. CARBLANC: Well, there are two questions on
11 this panel. The first one is what are the incentives,
12 and business, consumers, and the representative from
13 MITI gave some of these incentives for each category of
14 stakeholder, but there is another question which is
15 what incentives, to do what for business, for consumers
16 and also for governments?

17 To answer the first question, in fact, it is
18 very difficult exercise to try to say this is a typical
19 incentive for business, this one is a typical incentive
20 for consumers, and these are specific incentives for
21 government. In fact, everybody, all stakeholders, have
22 incentives and common incentives. The first one is to
23 build trust, to protect or to promote economic growth,
24 to obtain that social equation will be kept, and to
25 have good governance. Then we can turn to specific

1 incentives.

2 Some have said for business that it limits or
3 reduces uncertainty. It's true, but nobody said on
4 this panel, at least, that online ADR also promises to
5 be tailored to global networks, because you can buy or
6 sell 24 hours a day, but you should also have the
7 possibility to resolve disputes 24 hours a day.
8 E-commerce is supported by technology, and online ADR
9 uses technology, too.

10 And then business and consumers are somewhere
11 on the network, and online ADR would be also somewhere
12 on the network. That would help avoid the frontal
13 problem with jurisdiction and applicable law.

14 Then there's another respect, which is that
15 online ADR is a key component of the co-regulation
16 which has been mentioned on several occasions. It
17 helps to measure the capacity of the market not only to
18 offer goods or services globally but also to offer
19 consumers globally easy redress and dispute resolution
20 mechanisms, especially for low value transactions.

21 As for consumer incentives, I thought that
22 maybe there were four main incentives. The first one
23 is transparency, education, information, choice and
24 consent. The second would be fairness, cooperation
25 with business and consumer can help, fairness, and find

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1 acceptable standards. The third one could be
2 effectiveness, cost efficiency and enforcement. And
3 the fourth one could be a backup by governments, in
4 particular for fraud or deception.

5 So, having said this, that all stakeholders
6 share common incentives, one of the questions which
7 could be maybe discussed on the panel is what
8 government, for instance, could do to help develop
9 online ADR? What would be the good incentives, and
10 what would be the actions which could negatively impact
11 on the development of ADR?

12 We can imagine that government could have a
13 role from facilitating ADR to regulating ADR with a lot
14 of-- with a large scale, and maybe the panel will want
15 to discuss this, but I wanted to highlight that
16 everybody has interest in trying to find solutions, and
17 to finish, with governments, there's a genuine
18 difficulty for courts and jurisdiction to deal with
19 small value transactions and disputes arising from
20 transactions in a speedy way and an effective way.

21 And it is important also for governments to
22 encourage alternative solutions. It will also save
23 public administration.

24 MR. STEVENSON: Thank you very much.

25 John Bell, if I could turn to you to follow up

1 on the -- you had mentioned in your talk the theme of
2 co-regulation, and one of our questions here was about
3 the incentives of government in connection with ADR,
4 and I wondered if you could say a little bit about how
5 you see that approach as affecting ADR, and also, I've
6 heard the term "co-regulation," but I wondered if maybe
7 it might be helpful to put it in context for us in the
8 United States, to compare that with when we were
9 hearing the discussions earlier of self-regulation
10 that's -- with regulatory teeth, I think as Hank
11 Perritt put it. Is that similar to what you all are
12 envisioning by co-regulation? How is it different?

13 MS. WELLBERRY: And if it is similar, why don't
14 you call it self-regulation? Why do you call it
15 co-regulation, if I may jump in?

16 MR. BELL: Because it's not self-regulation.
17 We're devils for detail.

18 In fact, in all the discussions we've been
19 having, one of the difficulties in fixing what the
20 incentives and disincentives are is it's difficult at
21 this point to see what the detail looks like so you can
22 do your bottom line cost-benefit analysis for
23 individual companies.

24 I think there's a consensus here that there
25 will have to be a range of schemes and things, and

1 answer -- I think it was Professor Wheeler who raised
2 this question, that until we get to the next stage
3 where you begin to actually examine specifically, you
4 know, how binding should it be, how expensive should it
5 be, how heavy should it be, how complimentary it should
6 be to the legal process that is there if we don't
7 manage to find legal processes, once we get to that
8 stage of detail, we will be much, much more able to
9 work out what the specific incentives are.

10 I think the general incentives are obvious for
11 anybody to see, that alongside a whole range of other
12 and only alongside a range of other initiatives, from
13 good practice and good companies in their direct
14 dealings with their customers, to codes of conducts and
15 so forth, and that we will create an environment in
16 which the business will be grown and which those who
17 act in a positive way will be rewarded in terms of
18 sales.

19 People wouldn't invest so much in their brand
20 and their advertising when they get their IPOs and they
21 get out there and try to grow if there wasn't something
22 to be done in terms of generating trust, relating that
23 to the bottom line down the line.

24 That's why, just to come back to what you asked
25 me specifically, when we talk about co-regulation, what

1 we mean is you have a slightly different system here in
2 the U.S. where you have self-regulation and the FTC,
3 which has the teeth to come in and do the enforcement.
4 Our system is very much related to normally up front
5 you get very specific regulations, and we have a very
6 slow and ponderous court system, which may eventually
7 get you before you die. So, we need something that's
8 slightly more up front, more up front, and I think what
9 we tried to do both in terms of this idea of a
10 consensus approach, that it's not simply either for
11 government to be in or out of the process.

12 Government in this particular case, because of
13 the question of -- as I said earlier, it touches on
14 citizenship, because economic factors are so important
15 for the way in which people identify themselves. It
16 touches on the fact that what governments can bring is
17 not so much heavy regulation but to endorse that good
18 practice.

19 Now, what we mean by "co-regulation" is that in
20 practice, the group of stakeholders come together, so
21 -- operators, portals, consumer groups, legal groups,
22 institutions and so forth, they go through a process
23 working with in our case the Commission as a
24 facilitator with the process to structure the
25 discussion, to raise particular issues, and in this

1 case, when we're talking about codes of conduct and
2 trust marks, where there is at this stage no clearly
3 established what we call a key.

4 We have certain things in the background that
5 these things must be consistent with, but it's possible
6 then to try and come up with a body of policy which the
7 stakeholders have ownership on from the earliest stage,
8 and that way it's like self-regulation, but in order to
9 sell it to the public, they would like to have the
10 blessing of the public authority. So, what we would do
11 in that case is we would take out our lightest
12 instrument, which in this case could be, for example, a
13 Commission recommendation, which is not binding, which
14 simply comes out and says these are the general
15 principles that we would like to see applied and by
16 those operating specific codes of conduct, and this is
17 what we would like to see happen in terms of trust
18 marks.

19 So, in the public domain you have people who
20 can see that this has been developed by the people who
21 have to run it and who will have to operate it and have
22 to live and suffer under it, but that it has been
23 endorsed in a public way, although in a nonbinding,
24 nonenforceable way, and that is how we are going about
25 the co-regulation. So, it's kind of self-regulation

1 with a blessing if you want to summarize it.

2 I should say that the whole idea of
3 co-regulation will be discussed in a very systematic
4 way in Europe in the coming months as part of a whole
5 review on governance and how Europe actually finds and
6 develops different tools to deal with the issues of
7 governance in the new economy and so forth.

8 I hope that's some kind of answer anyway.

9 MR. STEVENSON: No, I think that was very
10 helpful to put it in context. And John Bell mentioned
11 the lightest instrument available. If one of those
12 light instruments is out there, how does that affect
13 the incentives of businesses doing business in -- say
14 U.S. businesses doing business in Europe, or how does
15 that affect the marketplace? Does anyone have a
16 particular reaction to that?

17 Mike Wheeler?

18 MR. WHEELER: The question is whether I can
19 adapt what I was going to say to the question you just
20 put.

21 MR. STEVENSON: It's always a challenge.

22 MR. WHEELER: And the answer is probably not
23 terribly well, but I think it's in the spirit of it,
24 and you can rule me out of order, please, on this.

25 Jill Lesser said something in passing which I

1 think is very important about dispute avoidance. If
2 you think about traditional customer service that's
3 done internally, it's beneficial to the company in
4 resolving specific transactions, it's beneficial to the
5 company in terms of reputation, but it's beneficial in
6 a third way if the company is alert to learning
7 possibilities of how it can organize itself more
8 effectively.

9 What happens when dispute resolution is
10 out-sourced to neutral parties? If I -- and I am a
11 researcher -- I would love to get my hands on the
12 CyberSettle data which is all encrypted. I'd love to
13 now how people variously have a wish price and a taking
14 price. I assume if I would love to see it, the
15 insurance companies would very much love to see it.

16 By the same token, I think if Colin or anybody
17 else gets Land's End as a client, Land's End will want
18 to know over a period of time are there recurring
19 problems that we're having, and is it a breach of your
20 responsibility as a neutral if you refuse to give that
21 information to your companies? Because I would assume
22 that one of the incentives for companies would be we
23 want to learn, we want to be able to have better
24 relations with our customers, but if they can't get
25 that data in some form, then I think there's a little

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1 bit of a disincentive.

2 So, if that's in order or out of order, I'll --

3 MR. STEVENSON: I mean, it's an interesting
4 point.

5 To follow up, though, on the thought of the --
6 what John Bell described as the kind of light
7 instrument or the self-regulation with a blessing I
8 think it was, maybe I'll ask Roger this question:

9 How does that affect the incentives that, say,
10 your group has in putting together the kind of package
11 you've been thinking about?

12 MR. COCHETTI: Well, I think I'm going to take
13 a little bit of chapter from Mike's book and build the
14 answer to that question into another comment that I
15 wanted to make, as well, which I think does come back
16 to this specific question that was raised, but I, too,
17 was struck by Jill's phrase "dispute avoidance,"
18 because I think it's a very significant point that
19 should not be lost in our overall conversation today,
20 and that is, if you think about web-based consumer
21 sales or retail activity on the web, it is important to
22 recognize that this medium is a far more competitive
23 medium than most offline medium, you know, sort of
24 circumstances are, and because of that consumers have
25 far more tools available to them to make sure that they

1 shop at a merchant who they like, who they're
2 comfortable with, who they're satisfied with, than if
3 they're confined to where they can walk to or where
4 they can drive to or where they can take a bus to. So,
5 the very competitiveness of the medium I think is a
6 major feature in its dispute avoidance.

7 On the issue of light government intervention
8 and its impact on the incentives that I was describing,
9 I guess it was our group -- as a group I don't think we
10 ever addressed that question, so I won't try to speak
11 on behalf of the group, I'll give my own view of that,
12 and that is I think, as with everything else, a whole
13 lot depends upon the details. Where the government
14 intervention is aimed at criminal or other areas of
15 activity, which really clearly separate the sort of
16 legitimate merchants from those with whom only
17 government and law enforcement can deal, I think the
18 impact on legitimate merchants is de minimus.

19 Where the arm of the government begins to enter
20 and begins to affect merchants who are, you know, not
21 those who are out to break the law or make up the rules
22 for themselves as they go along, then I think the
23 further you go in that direction, the more it has an
24 inhibiting impact, because you're going to wind up
25 getting back to the very problem that we started with

1 when we talked about what are the sources of concern
2 for merchants; namely, governments have different
3 rules, and complying with this government's rules may
4 put you in trouble with that government's rules, and
5 the whole point of the exercise was to see if there was
6 another way that both gives consumers the protection
7 they require and doesn't put merchants in an untenable
8 situation.

9 So, a lot depends upon the details. I don't
10 think there's a black or white answer.

11 MR. STEVENSON: Frank?

12 MR. TORRES: I think the discussion about
13 co-regulation and self-regulation is an interesting
14 one, and it kind of sounds to me like co-regulation is
15 almost a negotiated rulemaking process, without a rule
16 coming out at the end, more like a here's what we
17 agreed to and a consensus document or some sort of
18 memorandum of understanding. But I think what I'm
19 having problems with is is it self-regulation to say
20 that we will comply with existing laws, you know,
21 whether it be privacy or dispute resolution or good
22 business practices? We firmly believe in
23 self-regulation, and we will regulate ourselves and
24 we'll promise to comply with existing laws.

25 To me, that's not quite enough, and it's almost

1 a sham for consumers for groups to be out there saying
2 that. It's something a little bit different if groups
3 come out and say we believe in self-regulation, and
4 we're going to set the bar very high for us. We're
5 going to go beyond what existing law requires and
6 provide for a system of dispute resolution which won't
7 prohibit a consumer from going to court, hopefully
8 won't make it mandatory that the consumer has to go
9 through arbitration first, although we can talk about
10 that, and we're going to make it fair. We're not going
11 to charge the consumer anything for it or charge the
12 consumer very little for it, and here are the details,
13 you know, here's how it's going to work.

14 Within 48 hours, you'll get a response. I like
15 the comment about, you know, the internet's 24 hours,
16 shouldn't we set up the system for dispute resolution
17 that's also 24 hours? Which kind of leads us all back
18 around to Jill's comments, that maybe at the end of the
19 day, with everything combined together, that what we're
20 really talking about is if business is engaged in good
21 practices at the git-go, and, you know, if the consumer
22 gets the product and doesn't like it and their first
23 order of business is to call the toll-free number or
24 send an e-mail and they get a quick response, then we
25 never reach the ADR. I mean, we never get there.

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1 So, the comment about ADR being a safety net I
2 think is right. So, it's like we've got to look at all
3 these things together to get there.

4 MR. STEVENSON: Thank you, Frank.

5 Are there any questions from the audience?

6 MS. BOWMAN: Hi, I'm Becky Bowman with the
7 Maryland Attorney General's Office, Consumer Protection
8 Division. I actually have a couple of -- two questions
9 that are somewhat related but actually are probably
10 more unlike than they are alike.

11 One, I'm wondering about the dilution factor as
12 more online dispute resolution businesses enter the
13 market. There was talk this morning about the
14 enforcement mechanism of online ADR being the fact that
15 if there is a record created of a business not
16 participating with an ADR program or participating
17 poorly with an ADR program, that that's what helps
18 enforce the provisions of the ADR program, but if more
19 and more ADR programs are developed online and they
20 don't have any coordination or sharing of information
21 with each other about how a particular actor works with
22 that ADR program, does that really then provide the
23 enforcement mechanism that was talked about this
24 morning? That's the question.

25 The other thing I -- that if someone could

1 address the issue of -- I've lost my thought -- oh, of
2 who gets to choose the forum. I know tomorrow there'll
3 be some discussion about mandatory arbitration kinds of
4 issues, but again, in terms of developing trust of
5 consumers in ADR programs, I think a lot of that has to
6 do with who gets to pick the ADR forum. We hear from
7 consumers who feel locked into a business' ADR forum
8 and don't trust that they're actually going to be --
9 the dispute's going to be heard by a neutral party,
10 that they're going to be heard by a party that's in the
11 pocket of the business.

12 And so those are just two issues that are sort
13 of floating around in my mind as you all have been
14 talking.

15 MR. TORRES: I think the -- I'll just address
16 the last point and then I'll shut up for a while.

17 I think the last point's a good one and to me
18 that's where the role of the government could play a
19 big part. If ADR holds out the promise that has
20 brought us all here today, then I think the appropriate
21 role of government isn't necessarily to run the system,
22 I don't think that would be the right approach, but at
23 least to promulgate or work maybe in this co-regulation
24 mode to develop a baseline set of principles, so no
25 matter which ADR group you go to or the business elects

1 to use, that there's a baseline of expectations that
2 consumers know is out there now.

3 There might be differences hopefully above
4 that, but there won't be anything below it. Maybe
5 that's a proper role for government to address some of
6 those types of questions.

7 MR. STEVENSON: If we could follow up on that
8 point as a competition matter, what best promotes
9 competition? Is it that -- I think Frank was
10 suggesting that having some commonly understood level
11 might promote competition. Is it possible, on the
12 other hand, that having different people with different
13 sets of standards competing to have the best standard,
14 would that possibly best promote competition? I just
15 throw that out to see what reactions people have in
16 terms of those two thoughts.

17 MR. RULE: Well, I would like to address that.
18 You know, the first part of the question that was
19 raised is this dilution question. You know, there are
20 lots of organizations that are emerging. You know, are
21 we diluting things to the point where they would become
22 meaningless?

23 You know, the most interesting comment from my
24 standpoint was Peter's comment, which is from a small
25 business standpoint, he sees no use for dispute

1 resolution at the stage that his business is at. You
2 know, at Online Mediators, I spend a lot of my time
3 talking to small web businesses, small to medium-sized
4 web businesses, and from the standpoint of dispute
5 resolution, the way most of these panels have talked
6 about it, mediation/arbitration, I agree. There's
7 really not much of a model.

8 But I think what we're talking about with all
9 these organizations and the ODR companies that I know
10 that are out there, including CyberSettle and
11 SquareTrade and a lot of people who aren't here today,
12 there's a lot of innovation going on. There are a lot
13 of new dispute resolution mechanisms that are being
14 envisioned and developed, sometimes in very niche
15 markets, that fit the needs of those particular kinds
16 of disputes, and I think these standards -- I think the
17 appropriate role for government may be to set some
18 floor that ensures that all of these mechanisms are
19 transparent, that there's disclosure, that then they
20 don't dictate, you know, how those programs must look
21 or how they must operate or days turnaround or the
22 rapidity of response, because some may be automated,
23 some may involve professionals, some may involve, you
24 know, free services. There's lots of different things.

25 I mean, just to share a model that I know we

1 have been discussing in the ODR community, the
2 entrepreneurial sector, we believe that customers will
3 come to demand these services from the companies that
4 they work with, and right now, when someone goes to a
5 website, they look for TRUSTe, they look for Verisign.
6 We believe that they could look for an online dispute
7 resolution seal, as well.

8 Now, who knows what seal that would be, but
9 that seal would be a guarantee of fair treatment from
10 that business, and the government has an important role
11 to play in educating both consumers and businesses
12 about the importance of these mechanisms and the
13 availability of these mechanisms but not regulating and
14 setting rules that say everybody has to have a program
15 that looks like this, because I don't think that would
16 be in anyone's interests.

17 MR. STEVENSON: Well, I think we've run out of
18 time for this panel, so I am going to give Colin the
19 last word on that, and I thank everyone for their
20 participation on this. It was very helpful.

21 We are running right to the minute a half hour
22 late, so if we could take a 15-minute break and we'll
23 start again promptly at 4:30. Thank you.

24 (Applause.)

25 (A brief recess was taken.)

1 MR. STEVENSON: We're just about ready to start
2 again, if you could take your seats, please.

3 Well, why don't we get started, and the others
4 will join us as they come in.

5 For our next discussion, we have a panel to
6 address what issues need to be addressed in developing
7 ADR mechanisms for the online marketplace, and we have
8 outlined a couple of issues for this panel and a couple
9 of issues for the next, and it may be just -- it's very
10 difficult to sort of talk about any one of these issues
11 without talking about all of them, but we're trying to
12 give some format.

13 What we wanted to focus here on were a couple
14 of the issues in connection with developing the ADR
15 mechanism to put into place and then some of the issues
16 that we wanted to talk about in I think it's the first
17 panel tomorrow were some of the issues that arise in
18 actually as you go through the process, such as what
19 procedure, what substantive law and the like.

20 Here we've identified a couple of issues in
21 connection with developing the programs that are put
22 out, and I'd like to start actually with the allocation
23 of costs issue. One of the things that we saw in a
24 number of the comments was about various models of
25 payment, and Professor Wheeler in the last panel raised

1 the question about, you know, how does this work from
2 an incentive point of view for the ADR providers?
3 Obviously there's a related point of how do the
4 incentives work in terms of payment or the business
5 model for the businesses, and I think also Barbara had
6 asked that question of our panelists this morning.

7 So, I'd like to start with the question of what
8 should ADR programs look like in terms of how payment
9 for them works and what factors influence the answer to
10 that question? In other words, there obviously are
11 different fora that have been discussed and there may
12 be different answers to that question.

13 With that I'd like to first -- well, first let
14 me introduce the panel, who are arrayed I believe in
15 alphabetical order, otherwise I'll get the names wrong.

16 Jean Baker from the American Arbitration
17 Association, and we're very pleased to have her here.
18 Ryan Baker from WebMediate, Inc. Karim Benyekhlef,
19 professor of law in Montreal and CEO of eResolution.

20 Ronna Brown, president of BBB of New York.
21 James Foskett is the vice president of the
22 International Association of Professional Negotiators.
23 Peter Gray from Internet Consumers Organization. Jane
24 Gunn, CEO for CPM Services.

25 Ethan Katsh, who we've heard a little bit about

1 already, and he's a professor at Amherst and has been
2 involved in these issues for some time. Sandra
3 Sellers, president of Technology Mediation Services.
4 And Michelle Turner, director and assistant general
5 counsel of Dell Computer Corporation and someone who's
6 also participated in I know a number of our workshops.

7 So, do I have any volunteers for my somewhat
8 convoluted question or shall I just choose someone to
9 see if they just choose to answer the question or not?

10 Ethan?

11 MR. KATSH: I'll volunteer, because I guess the
12 one nice thing about speaking at the end of the day is
13 that you've had a lot of time to think about the
14 question that is being posed to your panel, and what is
15 of interest to me is the phrase "online marketplace."
16 I mean, I've used that phrase myself, I've used the
17 phrase "online environment," but I think it's worth
18 taking note that what we -- we can look at this as
19 online marketplaces. There are lots and lots and lots
20 of online marketplaces, and what we're -- I don't think
21 we're designing the single miracle, one size fits all
22 ADR solution. I think the issues you raise, cost, face
23 to face versus virtual, all tie into what kind of
24 marketplace it is.

25 I have two experiences actually doing online

1 ADR or two fairly large-scale experiences, one with
2 ebay a year ago in which we mediated 150 disputes over
3 a two-week period, and the other in association with
4 Karim doing ICANN arbitrations for the last four
5 months, and those are totally different kinds of
6 environments. One is an environment in which
7 arbitration works. It works because there are built-in
8 enforcement mechanisms. In the ebay environment it
9 also works, because as you heard this morning, there
10 are market forces operating there that make it possible
11 for a high percentage of agreements to be carried out
12 without major enforcement problems.

13 So, I think there are a lot of things that can
14 be proposed that are common, but it's real important to
15 understand that the net has changed patterns of
16 commerce. Ebay is an online auction site, although
17 they don't even legally -- in California, I understand
18 legally in California they are not an auction site,
19 because auction sites or auction houses are required --
20 there are things required of auction houses that are
21 not required of them, but the point is they're
22 operating at a scale that has not been operated on
23 before. There are people making lots of money in these
24 marketplaces, but they have no -- they don't assume,
25 they don't acknowledge costs of doing business that

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1 many small businesses or large businesses do assume.

2 So, that's just one thing I -- make the
3 question even harder, deal with online marketplace but
4 also somehow deal with the fact that there are lots and
5 lots of different models out there.

6 MS. WELLBERY: Can I just -- do you have
7 specific examples of different kinds of models other
8 than the ones that we've already discussed today?

9 MR. KATSH: Well, I think, if I understand what
10 you're asking, there are in terms of the question of
11 allocation of costs, for example, you can't really
12 expect the cost of resolution to be higher than the
13 value of the transaction, but maybe there are different
14 ways of allocating costs when you're dealing with a
15 marketplace in which there are huge numbers of
16 transactions and the cost of the dispute resolution
17 process can be spread across millions of transactions.
18 If you're dealing with a single website, you can't do
19 that, and you need a different kind of approach.

20 MR. STEVENSON: Yes?

21 MS. BAKER: For those of you who aren't
22 familiar with the American Arbitration Association, it
23 is a not-for-profit organization. We're the largest
24 international provider of ADR services, and on May the
25 25th, we announced that we are going to start up an

1 online ADR service.

2 What we're concerned about and what we've
3 always been concerned about is maintaining the
4 integrity of ADR. When we first started seeing the
5 rise in consumer disputes, there was this question of
6 the trade-off between costs and maintaining due process
7 procedural fairness, and we convened a group of
8 stakeholders, and we came up with an agreed-upon
9 consumer due process protocol.

10 Certainly this would be a good starting point
11 for anyone who wants to talk about what would
12 constitute a fair ADR process to resolve consumer
13 disputes; however, recognizing that the online
14 e-commerce world presents unique ADR challenges that
15 need to be addressed, the American Arbitration
16 Association is either going to convene a stakeholder
17 group to try and come up with due process protocols for
18 the resolution of online disputes, or we hopefully will
19 be invited to become a part of any of the groups that
20 are present here at this workshop so that we can
21 hopefully address a lot of major fairness concerns that
22 we have.

23 Quickly, on some of the concerns that I
24 identified this morning, typically you want open access
25 to the courthouse. If you go to ebay, you are going to

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1 have to go to SquareDeal (sic). Do we want to set up
2 ADR processes that have closed forums? Independent
3 administration, is there any kind of a financial
4 relationship that should exist between the online ADR
5 provider and, for example, ebay? If there is a
6 financial relationship, should it be disclosed?

7 These are just some of the unique types of
8 issues that online ADR dispute resolution, I think, is
9 going to present for all of us to have to address and
10 think about.

11 MR. STEVENSON: Jean, addressing on the cost
12 issue, do the guidelines that you mentioned address
13 that issue? How do they address that issue?

14 MS. BAKER: For consumer matters and disputes
15 under \$10,000, first -- now, remember, these are
16 tailored for domestic disputes, and so we look at it
17 and we provide the complainant the opportunity of going
18 to small claims court. Quite frankly, that is the
19 cheapest and easiest way for someone to resolve a
20 consumer dispute, you know, if everyone happens to be a
21 domestic party.

22 You get into problems online because there's
23 the potential of there being an international party.
24 That's one unique ripple. So, although we can offer
25 very inexpensive, no filing fee, reduced cost for the

1 arbitrators for below \$10,000 disputes, it's very
2 difficult for us to offer that same type of service if
3 an international party is involved.

4 And then the other thing is, should we be
5 scaling our costs, our fees? Should we still classify
6 above \$10,000 disputes as consumer disputes that
7 require some kind of low-cost ADR? If you're going to
8 provide low-cost ADR, then are there going to be
9 trade-offs that you have to make with regards the due
10 process/fairness issues? It's very complex issues that
11 need to be thought about and resolved.

12 MR. STEVENSON: If I can add to that, a couple
13 comments, one made by MIRC or Mediate.com, indicating
14 in their comment parties will likely not be willing to
15 pay the case management fees if their dispute is over a
16 dollar value that is less than \$1,000, and the comment
17 then, I'm paraphrasing, a model where business pays an
18 ADR provider to handle all disputes that's suitable for
19 small dollar transactions. And then Dell computer's
20 comment addresses the funding issue saying the
21 mechanisms -- and I believe this may track, also, the
22 e-commerce group proposal that Roger Cochetti had
23 described for us -- the mechanisms should be a
24 affordable and should not, for example, generally cost
25 more than the amount in dispute.

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1 And I put those out to ask, are those standards
2 appropriate? How much does it depend on the particular
3 kind of transaction involved?

4 Ronna, if I could call on you?

5 MS. BROWN: The Better Business Bureau's
6 probably a little bit unique in that we handle every
7 kind of complaint, whether it's a dollar or more
8 significant amount, but the bulk of complaints that
9 come to the Better Business Bureau system, and I'm
10 representing one Better Business Bureau out of the 150
11 that are around the United States, the bulk of them are
12 under \$3,000. So, we are dealing by and large with
13 what will be the vast majority of complaints that come
14 but are the hardest ones to deal with because the
15 amount of money is so small. So, many companies are
16 not going to have an interest in resolving this kind of
17 complaint.

18 The way that the Better Business Bureau system
19 handles the cost issue is that by and large consumers
20 are not charged. Our expenses are paid for by the
21 business community, not by the individual business that
22 a complaint has been filed against, but by all of the
23 businesses that are our members. So, although some
24 bureaus, including New York, charge consumers small
25 amounts of money -- and by small I mean \$3.80 -- to

1 file a complaint over the telephone, when people file a
2 complaint with us through the internet or through the
3 mail, it's free. So, by and large, consumers are not
4 charged under the way that we handle complaints.

5 MS. WELLBERY: Ronna, if I could follow up?

6 MS. BROWN: Sure.

7 MS. WELLBERY: How do you -- if the business
8 community pays for the services basically and
9 underwrites them, how do you ensure independence and
10 that the decision-makers are not going to be biased in
11 favor of business?

12 MS. BROWN: That's the question that consumers
13 often ask us. As soon as they've, you know, picked up
14 the phone, they've called, they have a complaint,
15 practically speaking, they've spent several minutes
16 telling somebody on the telephone how unhappy they are,
17 and then we start to tell them about what the process
18 is, and usually somebody will say, well, how do I know
19 that this is going to be fair?

20 How the Better Business Bureau system works is
21 we are supported by member companies. To be a member
22 of a Better Business Bureau, you agree to a whole set
23 of standards, not the least of which is that you comply
24 with applicable law, but standards which go above and
25 beyond that. How we handle complaints, though, is that

1 you handle complaints against any company which is in
2 your geographic jurisdiction. So, the jurisdiction in
3 the Metro New York Bureau is New York City, the
4 mid-Hudson area, which is Westchester, and all of Long
5 Island. So, regardless of whether or not a company is
6 a member, we handle any complaint that comes against
7 any company in that area.

8 Our mediators are primarily volunteers. We
9 have some staff who help and who supervise. Our
10 arbitrators are exclusively volunteers. People come,
11 there's a training, they're certified, they're tested
12 before they can be an arbitrator for the Better
13 Business Bureau system, and there are a set of
14 standards and guidelines to which they have agreed, but
15 we are not paying them. You know, they are making
16 decisions on their own.

17 MS. WELLBERRY: Thanks.

18 MR. STEVENSON: Peter Gray?

19 MR. GRAY: Yeah, I would like to put the cost
20 question in a slightly different context. First of
21 all, obviously we're talking about costs compared to
22 what? To the court system or some other form of
23 dispute resolution system? And I think that there are
24 plenty of people and others who have studied this,
25 probably a lot of people on the panel, and probably

1 show, and I think Ethan has made comments to this
2 effect before, that an online or any sort of remote
3 dispute resolution system is probably less expensive to
4 the customer than going to court.

5 But the other point I wanted to make was that,
6 taking yet another perspective, that consumer research
7 shows that people who place a particularly high value
8 on their time, in other words, convenience and time,
9 are probably most likely to buy online. Price and
10 trust are two other important factors. Thus, it would
11 seem to me that online dispute resolution, the ODR
12 system, should have a particular appeal to those people
13 who are online shoppers, because in the event that they
14 do have a dispute online, they are going to save both
15 time and money.

16 MR. STEVENSON: Okay. It's an interesting
17 point, compared to what, and that's I guess when we're
18 always talking about alternative dispute resolution,
19 alternative to what in a lot of senses. Is there a way
20 in which that should affect the thinking about what
21 costs are appropriate to impose on this process? And
22 obviously maybe the answer is different depending on
23 whether one is talking about a guideline or just what
24 makes sense for particular businesses to address or
25 what it makes sense for groups to adopt in their codes.

1 Ethan?

2 MR. KATSH: Well, I think there needs to be --
3 I think a lot of -- well, a lot of businesses have come
4 online because they have found that there are very low
5 costs associated with doing business online, and one of
6 the costs -- therefore, there are a lot of -- there are
7 -- on the other hand, there are some costs which they
8 need to take into account, and customer service is a
9 cost that most businesses understand, real world,
10 physical world businesses understand needs to be
11 provided.

12 In some online marketplaces, all you do is
13 advertise that you have, you know, 64 cases of Evian
14 Natural Spring Water for sale, and if the customer
15 doesn't like it, no customer service needed.

16 On the other hand, I think Peter's absolutely
17 right. Good business practice on the web means
18 opportunity to respond online. I found what I thought
19 was a mistake on my American Express bill. I don't
20 like calling up American Express, don't like calling up
21 any 800 numbers to complain, but American Express
22 online let me simply, you know, with two clicks contest
23 this charge. I thought that was -- you know, that's
24 dispute resolution. I haven't heard back from them,
25 but there is another lesson there, and that is I

1 thought I got a fair hearing in a figurative sense, and
2 that's another thing we're talking about.

3 The consumer needs to feel that they have had
4 an opportunity to make a complaint. Yes, we want a
5 response from that complaint, but we also want an
6 opportunity to make a complaint. There are lessons all
7 over the place. In the ICANN environment, there have
8 been about 800 complaints filed, 400 decisions, give
9 ore take 100, over a four-month period. Every
10 trademark lawyer I spoke to last summer predicted that
11 losers would run to court, because that is a nonbinding
12 arbitration process.

13 Maybe there have been a handful of losers who
14 have gone to court, but very few, and I think the most
15 plausible interpretation of that, again, is once
16 someone gets a fair hearing and there's reason to
17 believe they lost because they deserved to lose or
18 there was an argument that they deserved to lose,
19 that's fine, and I think that's what we need online,
20 opportunity -- you speak about due process, that's a
21 fair hearing. "Hearing" is a word that in a sense jars
22 a little beyond the online environment, but that's what
23 we provide, and that can be provided very cheaply.

24 MR. STEVENSON: Okay.

25 Michelle, let's call on you, and maybe I'll

1 rephrase the question, maybe a little unfairly, but
2 that's part of the fun of it. You say in the Dell
3 comment that the mechanism should be affordable and
4 should not, for example, generally cost more than the
5 amount in dispute. Why wouldn't Dell want to say it
6 should be free, it should all be free to the consumer?
7 What are the sort of issues that you confronted in
8 thinking about that?

9 MS. TURNER: If you don't mind, I'd like to
10 just make a couple of related comments first and get to
11 that in just a moment, but to echo some of what Ethan
12 has already said, as well as some of the ideas that
13 Jill Lesser from AOL put forward on the last panel with
14 regard to dispute avoidance, I think that one of the
15 things that we found at Dell, and for those of you who
16 don't know, we are a fairly significant presence on the
17 web, selling \$40 or \$50 million a day over the web,
18 generally in the price range of about \$2,000, so
19 something that's fairly significant to individual
20 consumers.

21 But the thing that we've found that's
22 significant is that the first line customer support
23 role, as Ethan mentioned, is incredibly important, and
24 it is the most cost-effective, the most direct, one of
25 the most efficient ways to help resolve customer

1 issues, questions, disputes and so on. We have had
2 tremendous success dealing with them both over the
3 phone as well as increasingly over the net in an online
4 environment. We're finding very little, if any,
5 resistance to going online.

6 Our customer care organization handles almost
7 200,000 calls every month from individual consumer
8 customers, and in the vast majority of the cases, over
9 80 percent of the time, we resolve those over the phone
10 with only 5 percent of those getting escalated. And
11 typically the cost to the company -- and it is free to
12 the consumer, they call 800 numbers, they contact us
13 over the web and so on -- the cost runs an average of
14 \$5, \$6 or \$7 per call to the company. So, far more
15 efficient and cost-effective for the company than any
16 of the other mechanisms that we learned about and
17 certainly then litigation.

18 I guess that was the main point that I wanted
19 to make. If you do -- however, if you are unable --
20 the other 18 or 19 percent of the cases, we do resolve
21 disputes through letters or e-mail, at this stage, with
22 less than 1 percent of those ever going to any other
23 body, like BBB or a state AG. So, we have been very
24 fortunate, but I think companies in the online
25 environment particularly are incentivised to do a

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1 fantastic job with customer experience and customer
2 service, because it serves the brand very, very well.

3 MR. STEVENSON: So, in terms of your incentive
4 to have a procedure where consumers would pay something
5 versus nothing, how would you look at that?

6 MS. TURNER: You know, in our case, certainly
7 in the unlikely event that we had to go to an outside
8 third party, we do believe that the cost should be
9 shared between the consumer and the company and that
10 that sort of a split has worked in a number of other
11 cases. Of course, you want to keep those costs
12 reasonable and low, and I think many of the folks we've
13 heard from earlier today offer mechanisms that would be
14 of low cost to the consumer.

15 The company is more than willing, and I think
16 most would be, to pick up some share of the cost, but
17 we feel like if it's completely free to the consumers,
18 in that event, you open sort of the flood gates to
19 potentially frivolous or irrelevant kinds of claims,
20 all kinds of issues that really don't belong in that
21 forum.

22 MS. BAKER: The Supreme Court has agreed to
23 hear a case, it's called Greentree Financial, and it
24 deals with who should pay when a financial loan
25 document includes a mandatory arbitration provision.

1 So, maybe we'll get some guidance from the Court this
2 fall concerning the issue of when is it appropriate to
3 pass all of the costs onto the business versus passing
4 it on to the consumer.

5 MR. STEVENSON: We heard from Ronna on the
6 question when Barbara was asking about about how
7 payment affects independence, and Ronna described the
8 BBB model. Are there greater concerns about
9 independence when you have a model where it's more
10 directly supported, funded and so forth by, say, an
11 individual business?

12 MR. KATSH: The problem with independence is an
13 interesting one, but the other side of that is, you can
14 deliver expertise from anywhere. So, if Dell is
15 handling all of its own disputes, everybody understands
16 that it is Dell, and Dell's brand reputation is at
17 stake, and they'll handle it cheaply, but on the other
18 hand, smaller businesses -- and there are a lot of
19 smaller businesses than Dell -- may not be able to do
20 that. They can out-source it, and that frankly to me
21 is one of the great opportunities here. Expertise can
22 be delivered and dispute resolution can be out-sourced.

23 There are confusions. When we did our little
24 pilot project with ebay, some people complained that we
25 were ebay. It said University of Massachusetts right

1 on our webpage, but I'm not sure there's much you can
2 do with some people who don't read carefully, but when
3 dispute resolution is out-sourced, then those
4 companies, such as we saw this morning, will have to
5 protect their reputation, their brand, and if there are
6 problems with impartiality, they will go out of
7 business, because what I think we've been seeing here
8 today is that dispute resolution has become a
9 marketplace, or at least I hope it is.

10 MS. WELLBERY: I wanted to ask a question. Is
11 there a correlation, either inverse or direct, between
12 the level of due process and the question of whether
13 the ADR is binding or not? I mean, do folks have a
14 reaction so that they feel more comfortable, for
15 example, would people have a different reaction to
16 Dell's situation if in order to deal with Dell's
17 in-house consumer service department you had to give up
18 your right to pursue any other remedies, and does
19 whether the mechanism is binding or not affect your
20 sense of how "fair," quote unquote, the process needs
21 to be or what kind of guarantees of fairness you need
22 to have?

23 MR. KATSH: I think there's a very big
24 difference between perceptions of fairness when
25 arbitration is involved and perceptions of fairness

1 when mediation is the process. I don't think there are
2 problems of perceptions of unfairness with mediation,
3 because it's all voluntary, and people can refuse to go
4 along. Arbitration poses a lot of more difficult
5 challenges. The Virtual Magistrate was an arbitration
6 process. One of the reasons it was not successful or
7 it didn't receive cases was that parties did not want
8 to give up their -- to a third -- they did not want to
9 allow a third party to make a binding decision on them.
10 That was true then; that's true now.

11 MR. STEVENSON: Ryan, what are your thoughts on
12 this?

13 MR. BAKER: Actually, I agree with Ethan that
14 there is a huge difference in perception between
15 mediation and arbitration, but interestingly, I wanted
16 to make the point that in some of my interactions as a
17 law student, I talked to a judge in California, Judge
18 Wayne Brazil, who has actually done a lot of sort of
19 ground-breaking moves in alternative dispute resolution
20 in the courts, in the district courts, and one of the
21 things that he presented to us was his idea of a
22 mandatory mediation program, and a lot of us sort of
23 bowed our necks and hissed at that, but he described
24 the process, and actually, the interesting result was
25 after the fact, more of the people -- most of the

1 parties, I can't remember the exact number, but a large
2 majority were very satisfied with the process, a much
3 higher number than those who had gone through the
4 traditional adjudication process and who had not done
5 mediation.

6 Most of us would assume that mediation, which
7 is presumably based on cooperation and a voluntary
8 nature, but, in fact, there is evidence to support even
9 a mandatory form of mediation, and once they get into
10 the process and are educated, it's actually a very
11 positive result.

12 I guess the point from that is and I think
13 Judge Brazil's point was that there really is a need
14 for education, and I think that that's one of the
15 things that WebMediate feels should come from this
16 conference, is that the government should take a role
17 in sort of pushing baseline standards and in educating
18 consumers that there are alternatives out there and
19 alternative dispute resolution online is one of those
20 alternatives and that no one is going to be forced into
21 it. There is always going to be the court system as a
22 backup, and there is a market developing for ADR, so
23 that no one's going to be forced, you know, if you go
24 with ebay, you don't like SquareTrade, I would assume
25 that at some point, if not now, you are going to be

1 able to step out and go with WebMediate or go with
2 CyberSettle or whomever.

3 But it is important to realize that as these
4 things go forward, that education is really a key, and
5 even if at first the consumer is not really willing to
6 step into the process, that as the government pushes
7 standards of education that we might be able to really
8 increase the sphere that we can -- of online ADR.

9 MR. STEVENSON: Karim, would you like to follow
10 up on that point?

11 MR. BENYEKHLEF: Yes, I would like to follow up
12 on Ethan's comments concerning independence. I think
13 they are very important conceptual differences between
14 independence and impartiality. In fact, independence
15 is only a way to achieve impartiality.

16 The Supreme Court of Canada in the judgment
17 written by Chief Justice Lemier (phonetic) said a few
18 years ago that, in fact, independence can become a
19 useless concept if we can achieve impartiality. So,
20 what I think is very important is that we must
21 concentrate on the impartiality aspect to assure that
22 the mediators or the arbitrators are impartial.

23 Concerning the cost, the allocation of cost,
24 which is a related question with the question of
25 independence, there is multiple models that can be

1 achieved, and one of -- which is very, very
2 interesting, I think -- is the insurance model, meaning
3 by that that instead of asking ourselves who should
4 pay, should it be half and half or free for the
5 consumer or little amount, maybe what we can envision
6 is a kind of pool, which each transaction -- for each
7 transaction, there is a small amount of money into this
8 pool, and then when there is a dispute, the amount --
9 the money for insuring the mediation or the
10 arbitration, the fees, the amnesty fees or the fees for
11 the arbitrators can be taken into this pool. And then
12 this question of independence is mainly solved, I
13 think.

14 MR. STEVENSON: Jane Gunn, give you a chance to
15 comment.

16 MS. GUNN: Thank you.

17 I really wanted to comment on this issue of
18 independence. I think with the proliferation of ADR
19 schemes, both online and offline, one of the problems
20 we find in Europe, I think, particularly in United
21 Kingdom, is for both consumers and businesses to
22 actually understand how these systems work and how they
23 interact with the court process and at what stage it's
24 appropriate to use each of those.

25 Somebody once said that the British attitude to

1 technological change was to walk backwards into the
2 future looking lovingly at the past. I think
3 particularly with online systems there will be a
4 certain amount of uncertainty and fear. So, I think
5 one of the keys in establishing trust and credibility
6 is to educate both businesses and consumers in how to
7 use ADR systems, and if there is a proliferation of
8 systems which operate in a very different way, that
9 makes that task more difficult.

10 I think Nancy Ellis highlighted this lack of
11 awareness, and so knowledge and education is one of the
12 keys, but establishing simple, clear purpose and
13 principles for organizations when setting up or using
14 ADR systems is also very important, and clarity will
15 help both organizations and consumers to have
16 confidence in working with each other and cooperating
17 and using schemes.

18 I think the reason the courts are favored in
19 many cases is that it's an established system which is
20 seen as unbiased, and the other issue which I think is
21 important is who the neutrals or decision-makers are
22 and accreditation and training of those neutrals, and I
23 know that one of the ADR bodies in the United Kingdom
24 has been looking at establishing an international
25 standard of accreditation for mediators and neutrals.

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1 The other thing that occurs to me is that if
2 neutrals are going to be using or working online, that
3 brings up other issues, different ways of working, and
4 therefore there should possibly be some different way
5 or new method of training mediators who are good. Face
6 to face may not be so good online, and there are new
7 methods and techniques to be learned. So, that's
8 another issue that concerns me.

9 MR. STEVENSON: Sandra Sellers, if you would
10 like to follow up on that.

11 MS. SELLERS: Jane's comment leads very much
12 into what I was hoping to say, and that is that with
13 respect to the perception of fairness, I think
14 procedures of these new ADR mechanisms will play an
15 extremely important role. Certainly procedure is
16 important with respect to convening the process and
17 with respect to the conduct of the process, but it also
18 plays an important role when you don't have
19 face-to-face interaction, a more important role, I
20 should say, when there's not the face-to-face
21 interaction.

22 And what I've seen in my experience in online
23 mediation and arbitration so far is that the mediator,
24 when you're in a face-to-face situation, can create an
25 environment of comfort and buy-in of the parties who

1 are present by virtue of that working face to face, and
2 it's what you say, it's body language, it's a lot of
3 things, but it's creating an environment of comfort and
4 trust that then will act as a support for settlement
5 and moving towards resolution.

6 When you don't have that face to face, how do
7 you substitute for that creating of an environment of
8 trust, and I think that is where procedure plays an
9 ultimate role here. You need the parties to feel as if
10 they are being respected, cared for, et cetera, even
11 though you are not directly communicating with them at
12 the time.

13 So, with respect to perception of fairness,
14 it's especially important that the procedure develops
15 that all the parties feel they are participating, they
16 have not been forgotten about, their case is moving
17 forward, they are being treated equally, it's not just
18 the other side who's getting all the attention from the
19 neutral. And that I think is an underpinning of a lot
20 of what we've been saying here.

21 MR. STEVENSON: That raises an interesting
22 question that procedurally -- I guess in fairness can
23 mean a number of different things, I guess the
24 impartiality point that Karim made and then the sort of
25 procedural issues being laid out as you suggest. There

1 seems to be some trade-off, though, in that obviously
2 sometimes you can have an elaborate procedure that's
3 very fair but then that much more expensive and that
4 there then may be some trade-off, and one of the issues
5 that we had raised here is this sort of face to face
6 versus virtual dispute resolution, is that -- are there
7 arguments in -- under what circumstances do people
8 think that there -- I mean, does there ever need to be
9 face-to-face contact? There are some situations
10 obviously in which it's very beneficial in a lot of
11 ways, but in terms of how people perceive it as fair,
12 is there ever any need for that? And I don't know if
13 anyone has any particular -- Sandra, if you want to
14 react to that?

15 MS. SELLERS: I'll pick up on that. As I said,
16 I think that in a face-to-face environment, you can do
17 certain things by virtue of nearness in creating
18 personal relationships that you can't do online.
19 Therefore, you compensate in other ways when you are
20 not together. And I think that you can do a lot online
21 when you are not face to face.

22 There may be situations, particularly as an
23 arbitrator, when you need to assess credibility, where
24 perhaps you need to go beyond, so perhaps online only
25 is not a complete mechanism to reach that ultimate

1 result. Perhaps you need to bring in some other things
2 into the process, maybe a telephonic conference, maybe
3 even a face to face, but certainly when the people
4 you're dealing with are in different continents, the
5 telephonic conference might be a supplement for
6 particular issues.

7 You don't need to have the entire proceeding
8 that way. Certainly you can do most of it online, but
9 perhaps there might be extenuating circumstances with
10 respect to defined issues that might require some
11 additional mechanisms being brought in as a supplement,
12 but it still creates a fast and inexpensive method of
13 resolution.

14 MR. STEVENSON: Thank you.

15 Ryan?

16 MR. BAKER: Yeah, I just wanted to make the
17 point that one of the things that technology can also
18 do in changing sort of -- and it's substitute for the
19 face-to-face context is almost erect a sort of safety
20 wall. In other words, if I am a consumer and I have a
21 problem with this business of technology and I don't
22 want to call the American Express number, because maybe
23 I'm intimidated by American Express, maybe I have had a
24 bad experience in the past, but it's very easy to go
25 online and type something in and say, hey, I want to

1 get kicked into this dispute resolution mechanism and
2 give it a try, because what have I got to lose? If I'm
3 not paying, you don't have a lot to lose.

4 And in many cases I think there can be an added
5 level of comfort, particularly for those who have
6 already been transacting online. So, maybe going
7 online, instead of face to face, has a lot of
8 advantages, as well.

9 MR. STEVENSON: Would there be any reason to
10 require people to travel, do you think, in any of these
11 ADR circumstances? Obviously the example is if you buy
12 a pair of shoes from someone in Italy and then you have
13 to travel there to resolve the dispute, that seems to
14 be a little bit of a disincentive.

15 MR. BENYEKHEF: If I can pick up on this
16 question of face to face, with the Cybertribunal
17 experiment that was launched in '97, we dealt with more
18 than 150 mediation cases, and we did a kind of little
19 survey afterwards asking people if the fact that they
20 didn't meet the other party, was it kind of impediment
21 to the resolution of the conflict.

22 In general they told us that for a low value
23 transaction, they didn't want to meet the other party,
24 they didn't want to talk to him or to her, and the fact
25 of going online with some forms and some e-mail

1 exchanges and some chat room was quite enough.

2 MS. SELLERS: It's interesting that I think
3 from the neutral's perspective, online has certain
4 benefits that face to face does not have, and that is
5 that you can take advantage of the parties'
6 separateness to reframe and perhaps lower the tension
7 level between parties, no matter what kind of dispute
8 that is, and someone actually asked me at break whether
9 my online neutral experience has assisted my
10 face-to-face neutral experience, and I think that's one
11 identifiable point that I can say, yes, it does,
12 because despite the, you know, times in training, in
13 mediation training, people have said, oh, reframing is
14 the big thing a mediator can do.

15 Once you get into it, you tend to gloss over
16 it. You want to hear the parties' stories, you want to
17 get on with proposed settlements, you want to get them
18 into caucus, and you want to talk about what do they
19 really want out of this, and then there's a certain
20 aspect of it that you take back to the other side, but
21 it's not necessarily reframing the entire story. It's
22 the pieces that you think are necessary for resolution.

23 And so I think by having to do online
24 translation, if you will, from one party to the other
25 of what's being said, that reframing has made me think

1 from my mind how to better reframe when I'm face to
2 face.

3 MR. STEVENSON: Okay, James Foskett?

4 MR. FOSKETT: I think the nature of the beast
5 has always been for a person to avoid conflict at all
6 costs, and when you can do a mediation or an ADR
7 procedure online, he accomplishes a sense of security
8 because he is not confronted, but I think that also
9 part of what we have to do is educate the consumer to
10 some of the potential problems that he's going to face
11 when he goes online.

12 I think he has to understand that there could
13 be an interruption in service, which could happen
14 during his discussion. I think that he has to have a
15 mechanism where he can get in contact with the mediator
16 if they lose. I think basically in order for him to
17 feel comfortable and understand the process and enjoy
18 it, he's going to have to have strict ground rules laid
19 out so that he understands the potential problems that
20 doing business on the internet can cause him.

21 And I think if he understands that, if we you
22 train him and educate him in the beginning, then the
23 process will be a lot fairer for him and a lot better
24 for all parties all involved.

25 MR. GRAY: Can I just pick up on that, because

1 a couple of people here talked about education, and I
2 think that's good. We didn't talk about it much before
3 this panel, but it seems to me the big challenge, and
4 it's a huge challenge, is to educate the consumer on
5 the pros and cons of all of these things. It's
6 complex. Somebody on the previous panel I think
7 mentioned the fact they don't a difference between
8 mediation and arbitration, and that's probably true. I
9 mean, a lot of people don't know how to balance their
10 checkbooks just by, you know, how many years of trying
11 to get people to think of how to do that, and now you
12 don't have to do it anymore anyway, because you use
13 credit cards and debit cards and all kinds of other
14 payment mechanisms, and lots of people don't even
15 bother to worry about their checkbooks until the checks
16 bounce.

17 But anyway, I think the education thing, we
18 need to spend a lot more time on that. What does that
19 mean? I think a lot of it is disclosure and choice and
20 back to the basic fairness principles that we applied
21 earlier to Fair Information Practices and all of those
22 things, I think, that apply to consumers right here,
23 too. Consumers ought to know what they're getting
24 into, what the pros and cons are, what the costs are
25 going to be, and I think that on balance, allow them to

1 make the decision.

2 Do they want to do online dispute resolution or
3 do they want to do face to face or some other form?

4 There's a practical reality, of course, that face to
5 face may not -- may be totally impractical in a lot of
6 situations we're talking about, particularly the online
7 transactions across borders, but putting that aside, I
8 still think choices have to be there, and the education
9 probably is huge, and that's where business and
10 government has to put a lot of effort into that.

11 MS. WELLBERY: If I could follow up on that,
12 Peter, in reading through the comments, I think it
13 became apparent that a lot of people think education is
14 very important, and I think that's one of the roles
15 also that a lot of folks seem to think that the
16 government can help out on. I guess it would be very
17 helpful to us if you could give us a better sense of
18 what you mean by "education" or how education might be
19 accomplished, either now or in the near future, because
20 for me, when I think about it, it's sort of
21 undifferentiated.

22 MR. STEVENSON: Maybe we should segue to the
23 other issue which we had flagged, which is what kind of
24 steps are required or appropriate to provide consumers
25 with necessary information about ADR, because obviously

1 one point, one teachable moment is when people are
2 entering into a transaction, and there can be
3 information there obviously.

4 There were some comments that we received that
5 had some criticism about the nature of ADR disclosures
6 in some instances, and I think that they were including
7 online ones, and so I guess one question is what should
8 the education -- what form should the education take at
9 that point, so to speak? I mean, what are the
10 principles that should guide sort of when people have
11 provision of ADR?

12 James?

13 MR. FOSKETT: I know when we looked at some of
14 the user terms of service on some of the websites, they
15 were 11 pages long if you printed them. On page 9 on
16 the bottom, there was a clause about what your right of
17 appeal was. I don't think that a consumer, I don't
18 think that an educated person, anybody who has time
19 constraints is going to sit there and read through 11
20 pages and try and determine whether or not they have
21 any sort of redress.

22 So, I think that part of the education process
23 has to be to if you endorse an ADR process, then put it
24 right up front. You have got nothing to hide. Let the
25 consumer know that you are going to participate in an

1 ADR process. They have a resolution or a redress
2 system in place and that it's available. And I think
3 that will help resolve some of the consumer skepticism,
4 also.

5 MR. STEVENSON: Are there people who disagree
6 with that statement? Does that make sense to
7 everybody?

8 MS. GUNN: I think at the moment consumers,
9 what method of dispute resolutions is available, would
10 not be one of the key reasons that they would use or
11 transact or not transact with a particular company, but
12 maybe we're looking at trying to change that so that
13 they are actually beginning to look for some form of
14 sign that companies are committed to alternative
15 dispute resolution in whatever form that might be.

16 I think we have a saying in the United Kingdom
17 that caveat emptor, which is let the buyer beware,
18 which means the responsibility is placed on the buyer
19 to understand the presence of law and contract that
20 they're getting into in a contract transaction. So, I
21 think perhaps trying to put a certain element of
22 responsibility on consumers to understand what dispute
23 resolution methods are available and how those operate
24 would be appropriate, but I think this issue about
25 where the ADR clause is or where the clause about

1 dispute resolution is in the pages of paperwork is
2 another important one.

3 And perhaps it would be appropriate to
4 encourage companies to be a bit more up front about
5 what dispute resolution processes they are committed
6 to, and perhaps that's a way of giving some sort of
7 sign or trust mark associated with the company on the
8 front page, and that would be appropriate.

9 MR. STEVENSON: Okay. Well, if -- as I heard
10 James' comment, just translating maybe into FTC-speak
11 in my head, but I took it part of the point was that
12 you would have what we might phrase as a clear and
13 conspicuous or clear and prominent kind of disclosure.
14 Then -- so, correct me if I misinterpreted.

15 Then I guess the question that occurs to me is
16 well, if that's the case, then what types of
17 information should be part of that disclosure? What
18 are the pieces that are important to make known to
19 consumers?

20 Jean?

21 MS. BAKER: Obviously we at the AAA have been
22 very concerned about the types of disclosures that need
23 to be provided to potential users of ADR systems. At a
24 minimum, I think that you need to disclose exactly
25 who's -- the choice of ADR provider, whether there's a

1 choice of ADR provider. If it's going to be an
2 in-house or restricted choice of ADR provider, then I
3 think that there should be some statement concerning
4 the independence of that ADR provider or lack of
5 independence. There should be some statement
6 concerning the forum of ADR process that's going to be
7 used, whether it's going to be a binding forum or a
8 consensual forum, such as mediation. And certainly
9 whether the parties are going to get a choice in
10 selection of the neutral.

11 I think that is a key element of creating
12 perception that the ADR process is fair, and again,
13 that's one of the differentiating features that I
14 noticed from listening to this morning's presentation.
15 It appears that many of the online programs, at least
16 from the quick presentations this morning, actually
17 appoint neutrals, and I'm not sure how well received
18 that's going to be in the long term.

19 MR. STEVENSON: Ronna?

20 MS. BROWN: I agree with all of those comments.
21 I think there's a huge difference if a consumer is
22 going to be restricted, if there's some mandatory
23 process that the company is committing the consumer to,
24 then clearly you need a lot more details up front than
25 you do if the company has options that they're going to

1 provide to the consumer.

2 Having said all of that, and frankly, the
3 advice, you know, that we say to people over and over
4 again is know who you're dealing with, know what the
5 company's policies are. Nonetheless, the bulk of
6 consumers are not going to pay close attention to any
7 part of this until they have a problem. So, it is just
8 as important that at that point the consumer get good
9 information, good knowledge, and clearly that the
10 process is a fair one, because once you have the
11 problem, you've made the purchase, and you find that
12 you are committed to a specific program, that is the
13 moment when it's going to be hard for the customer to
14 have real confidence in either that program or the
15 company. So, that's the moment in time when there's a
16 real obligation to show that the process that you've
17 committed to is one which is inherently fair.

18 MR. STEVENSON: James?

19 MR. FOSKETT: No, I agree.

20 MR. STEVENSON: Ryan?

21 MR. BAKER: Thanks. Yeah, WebMediate feels, I
22 suppose, that having an online ADR solution will be a
23 selling point for the company and not necessarily
24 something to hide in the boilerplate language of
25 adhesive contracts that people click through when they

1 purchase something on the website. So, in that sense I
2 would posit that the company, that the seller online,
3 would have an incentive to provide as much information
4 as possible and make the process very transparent from
5 the get-go, whether or not the consumer goes through
6 and checks out all the information, that it at least be
7 available, and that it actually be prominent, and I
8 think that that doesn't have to be forced but that the
9 retailer would do that on their own.

10 MR. STEVENSON: That raises an interesting
11 point, that in some ways there are things here that are
12 -- business may have an incentive to highlight and then
13 some things they may not. To focus on the WebMediate
14 point, that there are some incentives maybe to
15 highlight some kind of ADR, what exactly is it about
16 ADR that people think might be something that would say
17 to consumers, oh, that's good, that's helpful?

18 I mean, I guess Ronna's point was they may
19 highlight something that is a material term because it
20 may somehow restrict or limit your rights, but what
21 kind of things might be the ones that sort of have the
22 opposite effect?

23 MS. BROWN: I think that I agree with your
24 point that companies actually should highlight it,
25 whether or not consumers pay attention to it up front

1 or not. I think part of what you're doing when you
2 highlight that you have committed to a specific dispute
3 resolution program or some set of options is that
4 you're telling consumers that they should trust your
5 company and that that's really sort of the underlying
6 message that companies want to give to consumers. You
7 want them to do business, you want them to feel good
8 about you. So, I think that's really an important part
9 about saying up front that you're part of some process
10 so that if they have a problem, you're going to make it
11 easy for them to get it resolved.

12 MR. STEVENSON: Okay. Do other people have
13 reactions to that?

14 Is this going to be something that consumers
15 are really going to care about one way or the other?
16 We all care, but I mean are consumers going to care?

17 MR. KATSH: I mean, one problem is that
18 companies are reluctant to admit that there's ever
19 anything wrong with any of their products, that there
20 are ever any disputes, even the -- you know, the
21 automobile manufacturers who have been involved with
22 the Better Business Bureau don't like to advertise that
23 this is a service that's available, because even though
24 everybody who has ever bought a car knows that there
25 could be something wrong with the car, it's a peculiar

1 psychological problem, and I think it's a problem that
2 needs to be overcome here, and I think the way to
3 overcome it is to have a significant number of
4 companies which do commit themselves to dispute
5 resolution, do indicate that you can have trust that
6 they will at least come to the table. They may not
7 agree to binding arbitration, but at least they're
8 willing to come to table. And then, then the
9 psychological impediment perhaps may erode.

10 MR. STEVENSON: Peter?

11 MR. GRAY: I'd like to answer your question a
12 little bit here in the following way: I think that
13 probably consumers don't care until they have a
14 problem. It's like everything else. I mean, we have
15 got -- we heard a lot this morning or earlier today
16 about the charge-back system, most people don't care
17 until they have a problem, because most people don't
18 have charge-back problems. Still, there is a
19 significant volume of charge-backs. I think it's the
20 same thing.

21 People aren't going to go shopping online,
22 because -- whether or not you have a trust mark on your
23 webpage, I think that's a secondary consideration.
24 Lots of people disagree about that, but I've never
25 thought that seals, despite Ira Magaziner's espousal of

1 that from day one, are going to do a heck of a lot for
2 consumers. I think that people assume that they are
3 dealing with somebody reputable, they are going to go
4 with the brand name. If I'm purchasing something from
5 Amazon, I'm going to feel one way, and if I'm
6 purchasing from a merchant that I don't know anything
7 about, I may need a feeling of confidence that there's
8 some sort of dispute resolution system that I can rely
9 on.

10 So, I don't think this is the primary reason.
11 I think we can get carried away with -- as you said,
12 you know, we all care about this stuff. I don't think
13 most people care about it, because they are not going
14 to be affected. It may depend on more -- I forget what
15 percentage, but most people aren't going to be
16 affected.

17 MR. STEVENSON: Does that perspective change
18 when we talk about international transactions, because
19 one of the things I think that people, as they buy
20 domestically, have some sense that there's some way
21 they can do something, and they also may know that
22 there are lots of obstacles to that, but they have some
23 sense of how it fits into the broader scheme. Is it
24 reasonable to expect consumers will pay more attention
25 to this in international transactions? How does that

1 affect what information it would be appropriate to
2 disclose about ADR? Say you want to buy shoes from
3 Italy, Australia or something like that.

4 MS. BAKER: Well, I think if your goal is to
5 really encourage cross-border consumer online
6 transactions, I don't think it's going to take domestic
7 purchasers long to realize that they can't go into
8 small claims court and get some kind of a judgment
9 against an international seller. So, there may be a
10 lag in time before the light bulb goes on with the
11 consuming public, oh, if I buy from someone overseas,
12 I'm going to have a difficult time perhaps.

13 So, I think long term, yes, I think they are
14 going to start looking towards doing business with
15 businesses that have recognized and perceived as fair
16 ADR processes in place.

17 Right now, we're just encouraging international
18 businesses, if you really want to jump-start this
19 cross-border e-commerce, then maybe one of the ways to
20 really encourage the growth of that marketplace is to,
21 in fact, preemptively include dispute resolution
22 procedures right away.

23 MR. STEVENSON: Michelle?

24 MS. TURNER: If I could just add to that, I
25 think companies like Dell and Microsoft, Time Warner,

1 some of the others who have joined the group that put
2 out the press release this morning would agree with
3 what Jean has said, and increasing consumer confidence
4 in this medium is critical to sustaining the momentum
5 and the growth of e-commerce, and I think we all see
6 that and see the importance of that and see this as an
7 opportunity really to advertise our commitment to
8 customers around the globe, to inviting them into the
9 process, to giving them a means that is low cost,
10 that's very effective, that's very fair and
11 independent.

12 And I think it may well be even more critical
13 in the international setting, where there are disparate
14 legal systems at stake, where there are geographic
15 separations, you don't know who the seller is, you
16 know, even less than you do in a domestic situation.
17 So, I think it may well be even more critical.

18 MR. STEVENSON: We have talked about a couple
19 of types of information to disclose. Are there other
20 forms of information that would either be helpful from
21 an incentives point of view to disclose or necessary or
22 appropriate bad news to disclose, other things that
23 would be included in the kind of information that
24 people think should be part of the information that's
25 passed on to consumers about how this process might

1 work if somebody's participating in it?

2 MR. BENYEKHLEF: Yes, I think it's very, very
3 important to tell the consumer at the outset of the
4 process what can happen once a settlement has been
5 reached. We could also envision the possibility of
6 giving some example of settlement on the website, to
7 educate consumer and businesses. And coming back to
8 this international transaction, we raised that this
9 morning, I think, quite briefly, the question of
10 language is very, very important. I know -- and when
11 we spoke about cultural differences, we spoke this
12 morning of language, but there is much more to that
13 than only language. When we are speaking about
14 cultural differences, there is a lot of other elements,
15 other than language, that must be taken into account.

16 That's why I think that for dispute resolution
17 provider, international cooperation is a must. I
18 cannot imagine dispute resolution provider, be it in
19 North America or in Europe, and wanted to act alone. I
20 think that cooperation is a given, because when we are
21 speaking about cultural differences, we can speak about
22 legal differences.

23 Jean was mentioning the inclusion of a clause
24 in a contract, a clause which will say that you will
25 have recourse through ADR, but one must be aware that

1 in Europe, in general, you cannot relinquish your
2 rights before the judicial tribunals, so that's another
3 difference that must be taken into account.

4 MR. STEVENSON: Okay. One last question, there
5 are several standards -- several groups that abide by
6 the model standards of conduct for mediators, and there
7 are some issues in there about -- the standards provide
8 that mediators should mediate in an impartial manner
9 and disclose all known conflicts of interest and recuse
10 themselves unless the parties agree otherwise if there
11 is a conflict.

12 Do those principles make sense for mediation,
13 indeed for arbitration? As we think about some of the
14 principles that are embodied in say the AAA and the EU,
15 stuff that John Bell before, is there any disagreement
16 with that proposition that I just put to you?

17 MR. GRAY: I think the only question is with --
18 a lot of those principles are good, but do they apply
19 equally and in the same way in the online environment
20 as they do in the offline?

21 MS. BAKER: And see, I think that's the kind of
22 dialogue we really need to have. As a potential user
23 of a mediation process, I know there are a lot of
24 individuals who feel that mediation, because it is not
25 -- does not render any kind of a binding, forced

1 decision upon the parties, therefore mediation is
2 inherently fair. I'm an old plaintiff's attorney, and
3 I have to tell you, I say no, mediation can be
4 manipulated, and certainly if you have a mediator who's
5 a very skilled -- well, if you have a party who's a
6 very skilled negotiator and they negotiate a volume of
7 the same type of dispute and you're having that
8 individual go up against an uninformed, perhaps
9 inarticulate consumer, even in a mediation session,
10 perhaps you can get an unfair result.

11 So, I think these are really the kinds of
12 in-depth fairness issues that all of us need to have a
13 dialogue about. I don't think it's -- I don't think we
14 want the government or AAA or anyone else to say, well,
15 that's the way it should be. Each one of you bring to
16 this dialogue a new and a very important, you know,
17 perspective. The indication that in European
18 countries, we couldn't include those kind of clauses,
19 very important to know that before we try to adopt some
20 kind of protocols.

21 So, I think it's really crucial that we address
22 the fairness issues from the point of view of an online
23 dispute resolution mechanism.

24 MR. STEVENSON: Are there questions from the
25 audience that people would like to ask, questions or

1 take positions, get reactions, cop attitudes?

2 Oh, we do have a question.

3 MS. SUESWEIN: Ruth Sueswein. I would like to
4 follow up with the American Arbitration Association,
5 getting back to costs for a second. You said you are
6 going to set up a program you announced May 25th.
7 What's the cost breakdown there? You are going to have
8 consumers pay for part of it, industry pay for it? How
9 are you going to break down that cost?

10 MS. BAKER: To be honest, we are not going to
11 make those decisions. We are going to convene that
12 stakeholder group and create a due process protocol
13 very similar to this protocol, and that protocol will
14 talk about resolving both consumer as well as
15 commercial disputes online, and at that point in time,
16 we're hoping that the Supreme Court will have rendered
17 its decision in the Greentree, which will give all of
18 us some guidance concerning how we can pass on costs,
19 certainly involving consumer disputes.

20 So, I can't give you a definitive answer,
21 because it's not, you know, a question that AAA is
22 going to attempt to answer themselves. We are going to
23 try and get all of the important stakeholder groups
24 together and come up with what everyone perceives to be
25 a fair answer.

1 MR. STEVENSON: Do you have a question there?

2 MR. DAGEN: Yeah, Rick Dagen.

3 MR. STEVENSON: You need to go to a microphone.

4 MR. DAGEN: I was just curious, in terms of
5 certification process for the online ADR, when you
6 think of something that would have immediate
7 credibility, Consumers Union, state government, even at
8 a minimum say the BBB, how long do you think that some
9 certification agency other than those type of forums,
10 it will take before they have some credibility?

11 Because as a consumer, if I see anything up
12 there right now online, unless it says Consumers Union
13 or something I recognize, the sense of impartiality is
14 not going to be immediately recognizable.

15 MR. BENYEKHLIF: Yes, this question of
16 certification is very important, I think, and at
17 eResolution, we are not against it. In fact, it may be
18 a very good way to achieve the kind of equality amongst
19 different providers, equality and quality, of course,
20 and I'm referring notably to the ICANN process, which
21 is a body that accredits dispute resolution provider
22 for domain name dispute.

23 So, we can envision that there could be a kind
24 of accreditation body, an international one preferably,
25 who will set standards, maybe based on the European

1 recommendation of '98 concerning out-of-court
2 settlement, recommendation on which I think everybody
3 agree, and this certification process would enhance the
4 consumer confidence and will help him or her make a
5 good decision.

6 MR. STEVENSON: Okay. Do other people have
7 reactions to that issue about the certification
8 process?

9 MR. KATSH: Well, I don't think you're going to
10 see certification very soon at all. I think you will
11 see indications on websites about qualifications of
12 mediators, but I don't think -- and I think there will
13 be enough information on those websites for consumers
14 to make judgments about the quality of service
15 overseas, but I don't think it's in the cards that
16 you're going to see certification of online mediators,
17 arbitrators, systems like CyberSettle. There's too
18 much of a need for experimentation at the moment and
19 certainly not enough agreement about what the standards
20 for certification will be.

21 MR. STEVENSON: Okay, we have another question,
22 I think. Actually, I should say the last question was
23 from Rich Dagen at the FTC.

24 If you could identify yourself.

25 MR. BARRY: Colin Barry, Office of Consumer

1 Affairs, Industry Canada.

2 I would just like to reiterate the point that
3 dialogue is very important to this. In Canada, we've
4 been working with consumer associations and industry
5 associations to develop principles for consumer
6 protection in electronic commerce. We've published
7 those principles and are now moving forward with some
8 type of voluntary initiative.

9 One of the methods we're considering is having
10 some type of seal of seals program, which would include
11 some type of accreditation criteria, along with having
12 an arbitration program and some type of compliance
13 mechanism. So, I think this goes back to this morning
14 the comments where people were saying that we have to
15 develop some type of mechanism for trust on the
16 internet for consumers and for small and medium-sized
17 enterprises to know how to properly go about electronic
18 commerce. And I think a very important part of that is
19 the alternative dispute resolution mechanism.

20 What we're considering is, for information
21 purposes, it's very similar to the Trust UK initiative,
22 and I'd be very interested in speaking to other people
23 here about this initiative and what we're doing in
24 Canada.

25 MR. STEVENSON: Okay. Yes, sir?

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1 MR. JOHNSON: I'm still Philip Johnson, and I'm
2 still from the ICC.

3 I just wanted to make a precision about what I
4 call due process, linguistic due process. English is
5 indubitably the worldwide international language now.
6 Most of the websites are in English. Many, many people
7 are capable of looking at a website in English, working
8 it out, clicking here and so forth, but when they come
9 to a problem later on, they are totally incapable of
10 using the English language to explain what has happened
11 and so forth and so on.

12 So, we have concluded at the ICC that for
13 international mediation and arbitration, we are going
14 to have to be using people who are at least
15 multilingual to the point of three languages, and if
16 you can get more than three, hire them fast, but it's a
17 very big issue, I think.

18 MS. SELLERS: That kind of ties in with the
19 point I made earlier, that the process doesn't
20 necessarily need to be exactly black and white online.
21 I know that looking at the ICANN process as a model or
22 an example of an international dispute resolution
23 process that's basically online, Scott Donahey has had
24 one arbitration where he had to have a telephonic
25 conference with a Korean translator, because the

1 respondent was Korean and understood enough English to
2 start but not really to get into the nitty-gritty.

3 So, perhaps hybrids can achieve the benefits
4 that we're looking for here but also overcome some of
5 the deficits that you've named.

6 MR. STEVENSON: Does anyone else have an
7 observation on the language issue?

8 MS. WELLBERRY: I actually have a question. I
9 wonder how much at least some of the language
10 difficulties can be dealt with by coming up with some
11 sort of standardized forms, so that if you think back
12 to the example we say today from SquareTrade where you
13 checked off what the problem was, and if the same
14 problem occurs in the same place in every form, it
15 doesn't really matter what language the form is in, to
16 the extent people can articulate their problems in a
17 standardized way, you simplify the language problem.

18 Are there other ways in which we can simplify
19 the language problem beyond that?

20 MR. BENYEKHLEF: I beg to disagree, because I
21 think that standardization, we can speak about
22 standardization for electric outlets or stuff of that
23 kind, but for dispute over the internet, it's very,
24 very difficult. I mean, you can establish some
25 standards, some box to click on or to check maybe in

1 North America, in the United States, but the standards
2 won't be the same in Italy or in France, for that
3 matter. Even if it's the same problem, the approach,
4 the cultural aspect aren't the same. The French won't
5 have the same approach to this -- to a problem than the
6 Italian or the German.

7 MS. WELLBERY: This is actually an idea based
8 on an idea that was floated to me by the European
9 Commission, which is something that they're considering
10 doing as a way of dealing with language problems within
11 Europe, and so it seems to me if you have the same
12 problem in the same place, then you -- you could -- to
13 a certain point, you can simplify your language
14 problem. At some point it breaks down, but there may
15 be other things like that that would be helpful.

16 MR. BENYEKHLEF: I think there's a lot of work
17 to do on that. I am part of the Equity Project for the
18 European consumer dispute resolution, and one aspect of
19 this project is to study this question of cultural
20 differences, which will be of great interest, I
21 believe.

22 MR. KATSH: It's not an insurmountable problem,
23 but the ICANN rules, for example, are written in
24 English, and there are now two French translations of
25 the rules and big disagreement about which is the

1 official -- which should be the official translation.

2 MR. STEVENSON: We have another question in the
3 back?

4 MR. DESTEPHEN: I'm Dan DeStephen from Wright
5 State University.

6 The conversation about the cross-border issues,
7 especially with respect to language difficulties, to me
8 talks about another group of individuals who I have not
9 heard talked about today, and that's the access to ADR
10 services on the web for people with disabilities, and
11 I'd like to get some comments from the panel on how
12 they see that kind of access evolving within this
13 online environment.

14 MR. STEVENSON: Any comments? Go ahead.

15 MS. BAKER: Actually, we handled face-to-face
16 mediations involving individuals who were disadvantaged
17 or disabled, and you're absolutely correct. Again,
18 that presents very unique problems that all of us need
19 to address. Certainly, you know, people who are unable
20 to hear on the telephone, if they're able to talk
21 through the telephone, but I don't know whether there
22 are translators set up for computer systems. I don't
23 know what the technology is out there.

24 Individuals, perhaps, who are on medication,
25 and therefore I'm not sure that they're understanding

1 of the transactions is as sharp as perhaps it should
2 be. I mean, there are all kinds of unique issues that
3 we really need to think through and make sure that we
4 don't just come up with some really quick, easy
5 solution that ultimately is perceived as very unfair.

6 But you're correct, individuals with
7 disabilities would be a unique group that we'd have to
8 think about.

9 MS. SELLERS: I have not had this experience,
10 so I'm going to be speaking from a general
11 philosophical standpoint, but as we said earlier, in a
12 sense online is better than face to face and the need
13 for reframing. Online can also have some benefit
14 versus face to face in not permitting individuals to be
15 characterized and perceptions that may or may not be
16 true.

17 So, for example, persons with disabilities that
18 the opposing party or even the mediator, through no
19 fault -- just because of human nature has certain
20 perceptions or accommodations that might color the
21 interaction of the parties at a mediation, that fades
22 away, and you don't see those disabilities. So, if the
23 disabilities can be compensated for so that the
24 disabled individual can still participate effectively
25 online, perhaps that individual has lost some of the

1 negative implications of being disabled.

2 MS. TURNER: If I might just add one point
3 quickly, I think that this discussion raises, again,
4 the fact that this is so very new for all of us, and we
5 don't have a lot of experience in these issues. They
6 are so multifaceted, there is no one easy solution. I
7 think it emphasizes the point that Ethan made earlier
8 that we really need to allow for a lot of
9 experimentation, a lot of choices to develop, time to
10 evaluate these things as they grow.

11 And I think one other point is to challenge
12 ourselves to remember that the technology that we have
13 today is not the technology we're going to have in a
14 month or six months or a year and that even today,
15 face-to-face conversations via computer are possible.
16 They are certainly not ubiquitous, but it won't be all
17 that long before they may well be even on a worldwide
18 basis.

19 MR. STEVENSON: Okay, well, thank you very
20 much. I'd like to thank our panel for their
21 contributions today.

22 Two quick announcements. First, we're going to
23 be starting again tomorrow at 8:45 rather than 9:00,
24 8:45, so we look forward to seeing you here, same
25 place.

1 Second, I've been asked to say, this is kind of
2 challenging my faith in the no free lunch theory, but
3 we had the breakfast, and SquareTrade is putting on
4 this reception that they have the notices out there
5 for, and I wanted to note that the exact location,
6 which is the Hotel Washington, North Terrace Rooftop,
7 and that I guess starts at 6:00.

8 So, with that, we stand adjourned and look
9 forward to seeing you tomorrow. Thank you.

10 (Applause.)

11 (Whereupon, at 5:55 p.m., the conference was
12 adjourned.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

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4 CASE TITLE: ADR CONFERENCE, VOL. 1

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7 I HEREBY CERTIFY that the transcript contained
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10 the FEDERAL TRADE COMMISSION to the best of my
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12 DATED: JUNE 17, 2000

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17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

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20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

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